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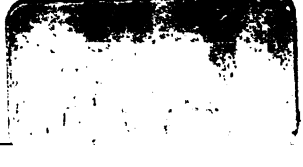

MANUAL

OF

THE SHERMAN LAW

A DIGEST OF THE LAW UNDER THE FEDERAL ANTI-TRUST ACTS

BY

EVERETT N. CURTIS, S. B., LL.B.

OF THE BOSTON BAR

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TO THE

HONORABLE LE BARON B. COLT

For many years Judge of the Circuit Court of the United States for the First Circuit and now Senator of the United States from the State of Rhode Island

Whose profound knowledge of the law, strict adherence to the highest ideals of the bench and the administration of justice, and uniform consideration and courtesy to the profession during his long term of faithful and honorable service in this circuit were and are greatly appreciated

This Volume is Respectfully
Dedicated.

PREFACE

The primary purpose of this handbook is to furnish practitioners with a ready means of finding pertinent judicial authority or expression of opinion upon points of law under the federal anti-trust acts which are constantly arising in active practice. In these modern and busy times, the opinion of any text writer apart from his authorities is of but little value to the trial lawyer, whose needs are based not upon what the law theoretically ought to be but so far as possible upon what the law actually is. Accordingly, in these pages, the precise language of the decisions has been followed except where prolixity or constant repetition of the legal principle rendered condensation necessary or desirable.

Undoubtedly there has been some conflict of authority both on account of the importance and elusive character of the subject, and on account of the fact that the principles underlying the law are still in a state of growth. It is surprising, however, that there has not been more confusion and that there has been so great uniformity of decision as to the facts constituting offenses forbidden by the Law.

While there is a difference of opinion as to the ultimate effect or scope of the *Standard Oil Co.* and *American Tobacco Co.* decisions, the legal situation is certainly clarified to the extent of indicating the policy of the Supreme Court so to interpret the Act as to repress the evil that it was designed to reach and to apply the remedy without regard

to disguise or subterfuge of form; the purpose of the Act as now announced being to reach only such restraints or monopolistic methods as are unduly obstructive to the movement of trade in the channels of interstate or foreign commerce, or unduly or unreasonably restrictive of competitive conditions.

Furthermore, the amendatory or supplementary provisions of the Clayton Act have modified or extended in important particulars the interpretation of the provisions of the Sherman Law. The provisions of the recent act creating a Federal Trade Commission, particularly those relating to the enforcement of certain provisions of the anti-trust laws and the prevention of unfair methods of competition in interstate and foreign commerce, are also important in this connection. Such provisions and their effect upon the law have been carefully noted in these pages where pertinent in order that so far as possible this manual could be brought down to date; and the full text of the anti-trust laws and the Federal Trade Commission Act is given in the appendix.

EVERETT N. CURTIS.

BOSTON, MASSACHUSETTS,
February, 1915.

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MANUAL OF THE SHERMAN LAW

CHAPTER I

MONOPOLIES AND RESTRAINTS OF TRADE AT COMMON LAW

§ 1. Monopoly by Royal Grant.

At common law the term monopoly included only exclusive rights obtained from royal grant by the issuance of letters patent, commission or otherwise and embraced not only arts, mysteries or the enlargement of new trades, but also in many instances ordinary articles of trade and commerce. It is, however, only monopoly in the latter sense which was early found to be obnoxious, and with some few exceptions was forbidden by the Statute of Monopolies; so that ordinarily by monopoly was understood to mean such grants by royal authority as were thereby condemned. It was largely in this sense that Lord Coke denounced monopolies in the following definition:—

"A monopoly is an institution or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade." *Chap. 85, Third Institute, 181.* See, 4 *Blackstone,* pp. 159–160.

§ 2. Monopolistic Grants in Time of Elizabeth.

The prodigality of Queen Elizabeth in granting monopolies both to public functionaries as a reward for distinguished services and to members of her household in lieu of a regular stipend occasioned distress and oppression throughout her domain. The articles made subject to such system were many, and included a great many articles in common use such as salt, iron, powder, steel, vinegar, oil, tin, sulphur, paper, etc. So exorbitant were these monopolists in their demands, that prices for their commodities were raised to an unconscionable extent,—salt for example being raised from sixteen pence a bushel to fourteen or fifteen shillings. *In re Charge to Grand Jury*, 151 Fed. 834, 835–836. (D. C.—E. D. Georgia, 1907.)

§ 3. Prohibition of Monopolies Granted by the Crown.

"Notwithstanding the objurgations of her subjects, Elizabeth, by wheedling and cajoling them in a manner not altogether unfeminine, succeeded in maintaining the monopolies in behalf of her favorites, and at the expense of her people. It was not until the reign of her successor, James I, that relief to the people was afforded. In the first Parliament of this King, a Committee of Grievances was appointed, of which Sir Edward Coke was the chairman, and it is doubtless ascribable to the labors of this great lawyer that the English statute was enacted, which to this day stands in all its original vigor among the laws of England. Of this act against monopolies our own anti-trust law is intended to be the equivalent, as affecting all matters to which the legislative and judicial power of the United States may extend." (SPEER, *District Judge.*) *In re Charge to Grand Jury*, 151 Fed. 834, 837 (D. C.—E. D. Georgia, 1907). See also *Price: The English Patents of Monopoly*, Chaps. I, II, and III.

§ 4. Evils of Monopolistic Grants.

The evils of monopolies granted by the British Crown which led to their suspension were the arbitrary fixing of prices, the limitation of production, and the deterioration of quality. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 52 (1911).

§ 5. Statutes against Forestalling, Regrating and Engrossing.

In addition to the Statute of Monopolies, other statutes were subsequently passed relating to offenses such as forestalling, regrating and engrossing necessaries of life, the evils consequent thereon coming to be regarded as constituting a monopoly or an attempt to monopolize. But as time went on, it was declared by Parliament that the acts prohibited by engrossing, forestalling, etc., did not have the harmful tendency attributed to them, and should be considered as favorable to the development of trade rather than in restraint thereof. In 1844, therefore, these later statutes were repealed, and thereafter such acts, even though they actually resulted in monopoly, were not prohibited. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 52–55 (1911). See also *The King* v. *Waddington*, 1 East, 143; *Russell: The Law of Crimes* (7th Ed. Canada), Vol. II, Chap. 9, pages 1919–1920; *Bishop's New Criminal Law* (8th Ed.), Sect. 518, *et seq.*

§ 6. Term Monopoly to be Applied to Result.

In this country, as has been the case in England, the acts from which it was deemed there resulted a part if not all of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself; that is, attention has been directed not to the correct name to be given to the conditions or acts which gave rise to a harmful result, but to the result itself and to the remedying of the

evils which it produced. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 56 (1911).

§ 7. State Constitution and Statutes.

The efforts of the people of this country to protect themselves against the injurious results of the monopoly have lasted for many years. This is true of the constitutional law of many of the states as well as statutory law. These provisions have been usually held to be merely declaratory of the common law. *In re Charge to Grand Jury*, 151 Fed. 834, 835. (D. C.—E. D. Georgia, 1907.)

§ 8. Unobstructed Course of Trade.

"There is no doubt that (to quote from the well-known work of Chief Justice Erle on Trade Unions) 'at common law every person has individually, and the public also has collectively, a right to require that the course of trade should be kept from unreasonable obstruction.'" (*Mr. Chief Justice* FULLER.) *Loewe* v. *Lawlor*, 208 U. S. 274, 294–296 (1908).

§ 9. Objection to Voluntary Restraints.

"From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he

had thus excluded one competitor, and by the same means might exclude others." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 279. (C. C. A. Sixth Circuit, 1898.)

§ 10. Unreasonableness of Restraint of Trade.

"The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly." (*Mr. Justice* MORTON.) *Alger* v. *Thacher*, 19 Pick. 51, 54, quoted by TAFT, *Circuit Judge*, in *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 280. (C. C. A. Sixth Circuit, 1898.)

§ 11. Partial Restraint Generally Valid.

At common law covenants in partial restraint of trade are generally upheld as valid when they are agreements "(1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the

buyer of the property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282. (C. C. A. Sixth Circuit, 1898.)

§ 12. Contract in Restraint Illegal Because Unenforceable.

At common law, agreements in restraint of trade were not unlawful in the sense that a civil action could be predicated thereon, but were only illegal in the sense of being unenforceable. *Wheeler-Stenzel Co.* v. *Nat'l Window Glass T. Ass'n*, 152 Fed. 864, 873 (C. C. A. Third Circuit, 1907); *Mogul Steamship Co.* v. *McGregor*, L. R. App. Cas. (1892) 25; *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 279. (C. C. A. Sixth Circuit, 1898.)

§ 13. Mogul Steamship Company Case.

While the celebrated case of *Mogul Steamship Co.* v. *McGregor* was not finally decided by the House of Lords until 1892, or shortly after the passage of the Sherman Anti-Trust Act, it serves reflexly to show the exact state of the law in England at the time such statute was enacted. Here damages were sought from a combination of companies engaged in the tea carrying trade at Hankow, China, who conspired to drive the plaintiff out of business and to obtain a monopoly of the trade. This case illustrates very clearly the proposition that at common law no action for damages could be maintained for injuries resulting from any conspiracy, contract or other means of restraining trade unless such conspiracy, contract or means were indictable, notwithstanding the fact that such restraints were legally unenforceable. In some instances, however, this case has been referred to as an example of a combina-

tion which was held to be reasonable at common law, but certainly the decision does not go so far as this, both Lord Bramwell and Lord Hannen distinctly pointing out that the contract of association was void and unenforceable because in restraint of trade though not supporting an action for affirmative relief. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 286. (C. C. A. Sixth Circuit, 1898.)

§ 14. Restraint Lawful if Ancillary in Character.

Originally all contracts in restraint of trade were prohibited, but this doctrine was modified so as to permit restraints by contract which were partial as to territory or time and were otherwise reasonable. In modern times as new conditions arose, the trend of legislation and judicial decision has come more and more to adapt the recognized restrictions to such conditions to the extent of considering whether the restraint were only such as to afford a fair protection to the interests of the party in whose favor it was given and not too large as to interfere with the interests of the public. "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the in-

ference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." (*Mr. Chief Justice* WHITE.) *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 58 (1911).

The ancillary character of valid restraints at common law is well brought out by Ex-President Taft in his recent monograph on the Sherman Law in which he emphasizes the view that contracts in which the restraint of trade appears to be the chief object were unreasonable and illegal, but where the restraint was merely subsidiary and contributing to the main and lawful purpose of the contract the said restraint was held to be reasonable and legal. *Ex-President Taft: "The Anti-Trust Act," etc.*, page 12.

§ 15. Restraints of Contracting Parties and Third Persons.

It is also suggested by the same eminent text writer above mentioned that the test of reasonableness was limited at common law solely to those cases where the restraint was brought about through the curtailment of trade rights of a contracting party, and was never applied to contracts where the restraint was of person or persons not parties to the contract, which contracts were always void and unenforceable. *Ex-President Taft: "The Anti-Trust Act," etc.*, page 15.

§ 16. Combinations Constituting a Public Wrong.

At common law where combinations were illegal in the strict sense of the word and constituted a public wrong, one who incurred substantial loss thereby suffered a legal injury for which a private action would lie. *Wheeler-*

Stenzel Co. v. *Nat'l Window Glass T. Ass'n*, 152 Fed. Rep. 864, 873. (C. C. A. Third Circuit, 1907.)

The general doctrine is that at common law no matter "how harmful to others individual or combined action may be, if it is not unlawful, the damage or harm so inflicted does not constitute legal injury." (GRAY, *Circuit Judge.*) *Wheeler-Stenzel Co.* v. *Nat. Window Glass T. Ass'n*, 152 Fed. 864, 873. (C. C. A. Third Circuit, 1907.)

§ 17. Restraint as Affecting Value of Matter Sold.

"The underlying principle upon which the modern cases upon this subject are grounded is that although one cannot stifle competition by a bargain having that purpose only, yet when he purchases something or acquires some right, the value of which may be affected by the subsequent conduct of the seller, the purchaser may lawfully obtain the stipulation of the seller that he will refrain from such conduct." (SEVERENS, *Circuit Judge.*) *Jarvis* v. *Knapp*, 121 Fed. 34, 39. (C. C. A. Sixth Circuit, 1903.)

§ 18. Restraint Cannot Run with the Article Sold.

It is "a general rule of the common law that a contract restricting the use or controlling sub-sales cannot be annexed to a chattel so as to follow the article and obligate the sub-purchaser by mere notice. A covenant which may be valid and run with the land will not run or attach itself to a mere chattel." (LURTON, *Circuit Judge.*) *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 39. (C. C. A. Sixth Circuit, 1907.)

CHAPTER II

CONGRESS AND ITS RELATION TO THE ACT

§ 19. Course of the Act Through Congress.

The original bill was introduced by John Sherman in the Senate on Dec. 4, 1889. After various vicissitudes it was March 27, 1890, referred with amendments, proposed or adopted, to the Committee on Judiciary, through Senator Edmunds, who on April 2, 1890, reported back the same together with a substitute which had been drawn by them. The substitute bill was identical with the present statute, it having passed both houses of Congress unchanged, and having been approved and signed by President Harrison, July 2, 1890. *Walker's History of the Sherman Law*, Chaps. I and II.

§ 20. Power of Congress to Enact Statute.

"The law finds its authority in the power of Congress granted by the Constitution to regulate commerce with foreign nations and among the several states. 'The power to regulate,' said Mr. Justice Harlan, in his dissenting opinion, in *United States* v. *E. C. Knight Co.*, 156 U. S. 20, 15 Sup. Ct. 249, 39 L. Ed. 325, 'is the power to prescribe the rule by which the subject regulated is to be governed. It is one that must be exercised, whenever necessary, through the territorial limits of the several states.'" (SPEER, *District Judge.*) *In re Charge to Grand Jury*, 151 Fed. 834, 837–838. (D. C.—E. D. Georgia, 1907.)

"Under its power to regulate commerce among the

several States and with foreign nations, Congress had authority to enact the statute in question." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 332 (1904).

"Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the Anti-Trust Act has prescribed the rule of free competition among those engaged in such commerce." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 331 (1904).

§ 21. Power is Complete in Itself.

"Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice Marshall for the court in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 197, that the power of Congress to regulate commerce among the States and with foreign nations is the power, 'to prescribe the rule by which commerce is to be governed,' that such power 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.'" (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 335–336 (1904).

§ 22. Power to Regulate Commerce is Plenary.

"By the constitution of the United States, Congress is given plenary power to regulate commerce between the states and with foreign nations. In the exercise of this power, Congress may prevent interference by the states with the freedom of interstate commerce, and may likewise prohibit individuals, by contract or otherwise, from impeding the free and untrammeled flow of such trade." (DAY, *Circuit Judge.*) *Chesapeake & O. Fuel Co.* v. *U. S.*, 115 Fed. 610, 619. (C. C. A. Sixth Circuit, 1902.)

§ 23. Congress has Plenary Power to Restrict Every Instrumentality.

"Congress has plenary and indisputable power under the commercial clause of the Constitution to restrict and regulate the use of every instrumentality employed in interstate or international commerce, so far as it may be necessary to do so in order to prevent the restraint thereof denounced by the Act." (SANBORN, *Circuit Judge.*) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 187. (C. C.—E. D. Missouri, 1909.)

§ 24. Combination of Powerful Corporations.

"It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit." (*Mr. Justice* PECKHAM.) *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 571 (1898).

§ 25. Combination of Railroads to Establish Rates.

"Congress in the exercise of its right to regulate commerce among the several states, or otherwise, has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable." (*Mr. Justice* PECKHAM.)

U. S. v. *Joint Traffic Association*, 171 U. S. 505, 568–569 (1898).

§ 26. Congress Cannot Regulate Intrastate Commerce.

"While the constitution confers upon Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,' and 'to regulate commerce with foreign nations and among the several states and with the Indian tribes,' it does not confer upon it the power to regulate trade or commerce within a state, or to legislate in respect thereto." (RINER, *District Judge.*) *Moore* v. *U. S.*, 85 Fed. 465, 467. (C. C. A. Eighth Circuit, 1898.)

§ 27. A State Cannot Obstruct Interstate Commerce.

"The uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State, with its recognized power of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?" (*Mr. Justice* BREWER.) *In re Debs*, 158 U. S. 564, 580 (1895); *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 230 (1899).

"All will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution the supreme law of the land, anything in the Constitution and laws of any State to the contrary notwithstanding." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 344 (1904).

§ 28. No Corporation can Restrain Interstate Commerce by State Authority.

"No State can endow any of its corporations, or any

combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 350 (1904).

"No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 345, 346 (1904).

"Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution. . . . No state corporation can stand in the way of the enforcement of the national will, legally expressed." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 334–335 (1904).

§ 29. Constitutionality of State Enactment.

" In other words, if a claim is made in the Circuit Court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or de-

fendant. It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the Circuit Court in every case in which a claim is made that a state statute is in contravention of the Constitution of the United States." (*Mr. Justice* HARLAN.) *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 478 (1900); *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 544 (1902).

§ 30. Power of Congress not Unlimited.

"The power to regulate commerce has no limitation other than those prescribed in the Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guarantees which are also placed in the Constitution or in any of the amendments to that instrument." (*Mr. Justice* PECKHAM.) *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 571 (1898).

§ 31. Private Contracts not Excluded.

"The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 228 (1899).

§ 32. Contracts Extinguishing Competition.

The power of Congress to regulate commerce extends at least to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations doing business in several states, and which would in that way restrain interstate trade or commerce. *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 570 (1898).

"The Constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 332 (1904).

§ 33. Right of Contract Subordinate to Law.

"Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense, the general inherent right of every one to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 351 (1904).

§ 34. Constitutional Right of Contract Limited by Commerce Clause.

"We think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the States." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 229 (1899).

§ 35. Legitimate Regulation of Contracts.

"Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or mala in se, may yet be prohibited

by the legislation of the States or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce and a valid regulation thereof." (*Mr. Justice* PECKHAM.) *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 572, 573 (1898).

Congress may restrain individuals from making contracts under certain circumstances and upon certain subjects. *Frisbie* v. *U. S.*, 157 U. S. 160, 165–166 (1895); *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 572 (1898).

CHAPTER III

MEANING OF THE WORDS "INTERSTATE COMMERCE" OR COMMERCE AND TRADE AMONG THE SEVERAL STATES

§ 36. Act Includes Both Trade and Commerce.

"When the act prohibits contracts in restraint of trade or commerce, the plain meaning of the language used includes contracts which relate to either or both subjects. Both trade and commerce are included so long as each relates to that which is interstate or foreign." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 325 (1897).

§ 37. Interstate or Foreign Commerce must be Involved.

In order to bring a combination within the interdiction of the act, it must appear that it is more than a mere combination in restraint of trade; it must involve the restraint of interstate or international commerce. *Gibbs* v. *M'Neeley*, 118 Fed. 120, 123 (C. C. A. Ninth Circuit, 1902); *Dueber Watch Case Mfg. Co.* v. *Howard Watch Co.*, 66 Fed. 637, 642. (C. C. A. Second Circuit, 1895.)

§ 38. Interstate Commerce Defined.

"'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of

the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 210; *Brown* v. *Maryland*, 12 Wheat. 419, 448; *The License Cases*, 5 How. 504, 599; *Mobile* v. *Kimball*, 102 U. S. 691; *Bowman* v. *Chicago & N. W. Railway*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545, 555." (*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight Company*, 156 U. S. 1, 12 (1895).

"Commerce among the states, within the exclusive regulating power of congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' *County of Mobile* v. *Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 113. (C. C.—S. D. Ohio, W. D. 1892.)

"'Commerce,' in its simplest signification, means the exchange of goods, but with the advancing complexity of civilization it is now certainly significant, not only of exchange, but of the buying and selling of commodities, and especially of the exchange of merchandise on a large scale. It may be said to be trade, traffic, or exchange between different places and communities." (SPEER, *District Judge.*) *In re Charge to Grand Jury*, 151 Fed. 834, 838–839. (D. C.—E. D. Georgia, 1907.)

§ 39. Meaning of Commerce as Used in the Clayton Act.

"Commerce," as used in the Clayton Act, means "trade or commerce among the several States and with foreign nations, or between the District of Columbia or any territory of the United States and any State, Territory or foreign nation, or between any insular possessions or other

places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States, or the District of Columbia or any foreign nation, or within the District of Columbia or any territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands." *Clayton Act* (*Act of Oct. 15, 1914*), Sect. 1.

§ 40. Trade Defined.

"'Trade' has been defined as 'the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange.' The word 'commerce,' as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word 'trade.'" (MORROW, *District Judge.*) *In re Grand Jury*, 62 Fed. 840, 841. (D. C.—N. D. California, 1894); *U. S.* v. *Cassidy*, 67 Fed. 698, 705 (D. C.—N. D. California,1895); *U. S.* v. *Coal Dealers' Assn.*, 85 Fed. 252, 265. (C. C.—N. D. California, 1898.)

"In its general sense, trade comprehends every species of exchange or dealing, but its chief use is 'to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail,' and so it is used in the phrase mentioned." (WOODS, *Circuit Judge.*) *U. S.* v. *Debs*, 64 Fed. 724, 749. (C. C.—N. D. Illinois, 1894.)

§ 41. Scope of Interstate Trade and Commerce.

Interstate commerce is a term of very large significance. "It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it

embraces all the instruments by which such commerce may be conducted." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 597 (1898).

§ 42. Purchase, Sale and Transportation of Commodities.

"Transportation of commodities among the several states or with foreign nations falls within the description of the words of the statute with regard to that subject, and there is also included in that language that kind of trade in commodities among the States or with foreign nations which is not confined to their mere transportation. It includes their purchase and sale." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 325 (1897).

"The act in question has relation only to commodities, and possibly to persons, in the course of movement among the states, and to the agencies or means of transportation." (WOODS, *Circuit Judge.*) *U. S.* v. *Debs*, 64 Fed. 724, 752. (C. C.—N. D. Illinois, 1895.)

§ 43. Commercial Intercourse.

Interstate and foreign commerce "includes the purchase and sale of articles that are intended to be transported from one state to another, every species of commercial intercourse among the states and foreign nations. The term comprehends now intercourse for the purposes of trade in any and all of its forms, including transportation, purchase, sale, and exchange of commodities between the citizens residing and domiciled in the different states." (SHEPPARD, *District Judge.*) *U. S.* v. *Am. Naval Stores Co.*, 172 Fed. 455, 459. (Charge to Jury.) (C. C.—S. D. Georgia, E. D. 1909.)

§ 44. Navigation.

Interstate and foreign commerce include a line of vessels

engaged in transporting commodities between the different states of the union or between any of the states and foreign countries. *Darius Cole Trans. Co.* v. *White Star Line*, 186 Fed. 63, 64 et seq. (C. C. A. Sixth Circuit, 1911); *U. S.* v. *Pacific & Artic Ry. & Nav. Co.*, 228 U. S. 87 (1913).

§ 45. Towing Tugs Subject to Act.

Tugs employed in the business of towing vessels engaged in interstate commerce, and the lightering and wrecking of vessels so engaged, are themselves instrumentalities of interstate commerce. *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 742. (D. C. Ohio, E. D. 1913.)

§ 46. Entirety in Two or More States.

"If any commercial transaction reaches an entirety in two or more states, and if the parties dealing with reference to that transaction deal from different states, then the whole transaction is a part of the interstate commerce of the United States." (SPEER, *District Judge.*) *In re Charge to Grand Jury*, 151 Fed. 834, 839. (D. C.—E. D. Georgia, 1907.)

§ 47. What may be Regulated.

"Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce." (*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 13 (1895).

§ 48. Not a Technical but a Practical Conception.

Commerce among the states is not a technical legal

conception, but a practical one drawn from the course of business. When certain commodities are sent for sale from one state to another where it is expected after purchase they will end their transit, and when such expectations are filled, and this is a constantly recurring course, the current thus existing is a current of commerce among the states and the purchase of the commodities is a part and incident of such commerce. *Swift & Co.* v. *U. S.*, 196 U. S. 375, 398–399 (1905).

"The term 'restraint of commerce' was used in its ordinary, business understanding and acceptation. Among the recognized meanings of the word are 'prohibition of action; holding or pressing back from action; hindrance; confinement; restriction.' It is a restriction or hindrance created by the application of external force. It is a vis major applied directly and effectually to carriers of interstate commerce, which prevents them from operation." (PHILLIPS, *District Judge.*) *U. S.* v. *Elliott et al.*, 64 Fed. 27, 30–31. (C. C.—E. D. Missouri, 1894.)

§ 49. Foreign Commerce.

While the Act refers in terms to foreign commerce, it nevertheless is necessarily confined in its application to the territorial limits of the United States, and does not apply to acts in pursuance of a monopoly or in restaint of trade done in a foreign country. "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law." (*Mr. Justice* HOLMES.) *Am. Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 359 (1909).

§ 50. Passengers Between United States and Abroad.

The prohibitions of the anti-trust act apply broadly to contracts in restraint of trade or commerce with foreign

nations and it is clear that transportation of passengers between this country and Europe forms a part of the foreign commerce of the United States subject to the provisions of the act. *U. S.* v. *Hamburg-Amer., etc., Gessellschaft*, 200 Fed. 806, 807. (C. C.—S. D. New York, 1911.)

§ 51. Negotiation and Solicitation of Orders.

"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." (*Mr. Justice* BRADLEY.) *Robbins* v. *Taxing Dist.*, 120 U. S. 489, 497 (1887); *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 295. (C. C. A. Sixth Circuit, 1898).

"Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce." (*Mr. Justice* SHIRAS.) *Caldwell* v. *North Carolina*, 187 U. S. 622, 632 (1903).

"The power of congress to regulate commerce is not confined to goods which have begun their movement out of the state in which they are manufactured," but "it extends to negotiations and contracts made preliminary to the manufacture, sale, and shipment of goods in interstate commerce." (GILBERT, *Circuit Judge.*) *Gibbs* v. *M'Neely*, 118 Fed. 120, 123. (C. C. A. Ninth Circuit, 1902.)

"It is settled by the decisions of the supreme court that such commerce includes, not only *the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation.* That it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another. That such commerce begins, and the regulating power of con-

gress attaches, when the commodity or thing traded in commences its transportation from the state of its production or situs to some other state or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of the property in the state of its destination." (Italics mine.) (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 113. (C. C.—S. D. Ohio, W. D. 1892.)

"The goods are not within the control of congress until they are in actual transit from one state to another. But the negotiations and making of sales which necessarily involve in their execution the delivery of merchandise across state lines are interstate commerce, and so within the regulating power of congress even before the transit of the goods in performance of the contract has begun." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 298. (C. C. A. Sixth Circuit, 1898.)

"If, then, the soliciting of orders for, and the sale of, goods in one state, to be delivered from another state, is interstate commerce in its strictest and highest sense,—such that the states are excluded by the federal constitution from a right to regulate or tax the same,—it seems clear that contracts in restraint of such solicitations, negotiations, and sales are contracts in restraint of interstate commerce." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 295, 296 (C. C. A. Sixth Circuit, 1898); *Lowry* v. *Tile, Mantel & Grate Assn.*, 106 Fed. 38, 45. (C. C.—N. D. California, 1900.)

§ 52. Solicitors of Commission Merchants.

"The position of the solicitors (of commission merchants) is entirely different from that of drummers who are traveling through the several States for the purpose of getting orders for the purchase of property. It was said

in *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, that the negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 601 (1898).

There is no interstate commerce where solicitors "have no property or goods for sale, and their only duty is to ask or induce those who own the property to agree that when they send it to market for sale they will consign it to the solicitor's principal, so that he may perform such services as may be necessary to sell the stock for them and account to them for the proceeds thereof. Unlike the drummer who contracts in one State for the sale of goods which are in another, and which are to be thereafter delivered in the State in which the contract is made, the solicitor in this case has no goods or samples of goods and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 587, 602–603 (1898).

§ 53. Manufacturing is not Commerce.

"Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or wherever the transaction is itself a monopoly of commerce." (*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 12 (1895).

"Manufacture and commerce are two distinct and very

different things. The latter does not include the former. Buying and selling are elements of commerce," but something more than manufacturing is required to constitute commerce. (DALLAS, *Circuit Judge.*) *U. S.* v. *E. C. Knight Co.*, 60 Fed. 934, 936. (C. C. A. Third Circuit, 1894.)

"Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation." (*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 14 (1895.)

§ 54. Production of Manufactured Articles and Preparation for Transportation.

"Neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of congress." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 113. (C. C.—S. D. Ohio, W. D. 1892.)

§ 55. Mere Intent of Manufacturer.

"The fact that an article is manufactured for export to another State, does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the States and belongs to commerce."

(*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 13 (1895).

§ 56. Delivery within for Transportation without a Single State.

The mere fact that the sales and deliveries of a certain commodity took place within a single state is not controlling, where the purpose was in conformance with the usual course of business that the commodity would become a part of an existing current of interstate trade. *U. S.* v. *Reading Co.*, 226 U. S. 324, 367–368 (1912); *U. S.* v. *Whiting*, 212 Fed. 466, 471–472. (D. C. Mass. 1914.)

§ 57. Combination Restraining both Manufacture and Sale.

"Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203; *Kidd* v. *Pearson*, 128 U. S. 1, 20. If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 241 (1899).

"Where the contract is for the sale of the article and for its delivery in another State, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfil his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce, and not one relating only to manufacture."

(*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 246 (1899).

A corporation manufacturing goods in one state, and thence shipping to warehouses located in other states from which said goods are sold partly within said states and partly beyond their borders is engaged in interstate commerce. *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 51 (1912).

§ 58. Commerce Partly Intrastate and Partly Interstate.

Although some of the means whereby the interstate traffic was to be destroyed were acts within a state and some of them were as a part of their obvious purpose and effect beyond the scope of federal authority, yet the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a certain amount of intrastate business might be effected in carrying it out. *Loewe* v. *Lawlor*, 208 U. S. 274, 301 (1908).

§ 59. Act does not Apply to Intrastate Commerce.

"Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect." (*Mr. Justice* VAN DEVANTER.) *U. S.* v. *Patten*, 226 U. S. 525, 542 (1913).

§ 60. Congress has no Authority over Articles outside of Stream of Interstate Commerce.

"It is the stream of commerce flowing across the states, and between them and foreign nations that congress is authorized to regulate. To prevent direct interference with or disturbance of this flow alone, was the power granted to the federal government. Congress has there-

fore no authority over articles of merchandise or their owners, or contracts or combinations respecting them, which have not entered into this stream, or having entered, have passed out." (BUTLER, *District Judge.*) *U. S.* v. *E. C. Knight Co.*, 60 Fed. 306, 309–310. (C. C.—E. D. Pennsylvania, 1894.)

"It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted." (*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 16 (1895).

§ 61. Indirect External Effect of Enterprises wholly within State.

"Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy." (*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 16 (1895). See also *Hopkins* v. *U. S.*, 171 U. S. 578, 587 et seq. (1898); *Anderson* v. *U. S.*, 171 U. S. 604, 612 et seq. (1898).

§ 62. Stock Exchanges.

"It would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from States different from the one in which the exchange is situated and the sale made." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 597 (1898).

"The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 590–591 (1898).

§ 63. Charges for Facilities Furnished.

"Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288; *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312, 329, 330; *Kentucky & Indiana Bridge Company* v. *Louisville &c. Railroad*, 37 Fed. Rep. 567." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 592 (1898).

"In all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a

charge for a local facility provided for the transaction of such commerce." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 597 (1898).

§ 64. Commission Merchants or Agents.

The charges of a commission agent on account of his services "are nothing more than charges for aids or facilities furnished the owner whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different States are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another State. Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 591 (1898).

§ 65. State Line Through Stock yards.

There is no materiality in the fact that a state line runs through stockyards "resulting in some of the pens in which the stock may be confined being partly in the State of Kansas and partly in the State of Missouri, and that sales may be made at the time partly in one state and partly in the other. The erection of the building and the putting up of the stock pens upon the ground were matters of no moment so far as any question of interstate commerce is concerned." (*Mr. Justice* PECKHAM.) *Hopkins* v. *United States*, 171 U. S. 578, 603 (1898).

§ 66. Indirect State Legislation.

"The refusal of a State to allow articles to be manu-

factured within her borders even for export was held not to directly affect external commerce, and state legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was not direct." (*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 16 (1895).

§ 67. Not Necessary for Title to Pass.

It is not important where title to the goods sold by a salesman technically passes. "Commerce among the states is a practical conception, not drawn from the 'witty diversities' of the law of sales." (Concurring opinion of NOYES, *Circuit Judge.*) *U. S.* v. *Am. Tobacco Co.*, 164 Fed. 700, 714. (C. C.—S. D. New York, 1908). Quoting from *Rearick* v. *Pennsylvania*, 203 U. S. 507.

§ 68. Leased Machinery.

Machinery under lease which is shipped to lessees in various states is subject to the federal regulation of interstate commerce, notwithstanding the fact that such machinery is never sold. *U. S.* v. *Winslow*, 195 Fed. 578, 584. (D. C. Mass. 1912); *Cole Transp. Co.* v. *White Star Line*, 186 Fed. 63, 67. (C. C. A. Sixth Circuit, 1911).

§ 69. After Termination of Transportation.

"After the termination of the transportation of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, the sale, distribution, and consumption thereof in the latter state forms no part of interstate commerce. *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 99 U. S. 1; *Brown* v. *Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; *Coe* v. *Errol*, 116 U. S. 517,

520, 6 Sup. Ct. Rep. 475; *Robbins* v. *Taxing Dist.*, 120 U. S. 497, 7 Sup. Ct. Rep. 592, and *Kidd* v. *Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 114. (C. C.—S. D. Ohio, W. D. 1892).

§ 70. Immaterial that Transported Article is Taxed in Place of Manufacture.

"Any combination among dealers in that kind of commodity, which in its direct and immediate effect, forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another State, would in our opinion be one in restraint of trade or commerce among the States, even though the article to be transported and delivered in another state were still taxable at its place of manufacture." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 246 (1899).

§ 71. Single Shipment.

"We cannot doubt that there may be a conspiracy under the act with reference to a single shipment only." (DENNISON, *Circuit Judge.*) *Steers* v. *U. S.*, 192 U. S. 1, 5. (C. C. A. Sixth Circuit, 1911.)

CHAPTER IV

RAILROAD TRANSPORTATION

§ 72. Act Applies to Interstate Railroads.

"The act applies to interstate railroads as carriers conducting interstate commerce, and one of the principal instrumentalities thereof." (*Mr. Justice* DAY.) *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 82 (1912); *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 331 (1904); *U. S.* v. *Freight Assn.*, 166 U. S. 290, 312 (1897).

"Nor do we think that because the sixth section does not forfeit the property of the railroad company when merely engaged in the transportation of property owned under and which was the subject of a contract or combination mentioned in the first section, any ground is shown for holding the rest of the act inapplicable to carriers by railroad." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 313 (1897).

The statute is not "so uncertain in its meaning, or its language so vague, that it ought not to be held applicable to railroads. It prohibits contracts, combinations, etc., in restraint of trade or commerce. Transporting commodities is commerce, and if from one State to or through another it is interstate commerce." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 325 (1897).

"Pullman cars in use upon the roads are instrumentalities of commerce. *U. S.* v. *Debs*, 64 Fed. 763." (MORROW, *District Judge.*) *U. S.* v. *Cassidy*, 67 Fed. 689, 705. (D. C.—N. D. California, 1895.)

§ 73. Contracts in Restraint Between Competing Railroads.

"An act which prohibits the making of every contract, etc., in restraint of trade or commerce among the several States, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the States, provided such contract by its direct effect produces a restraint of trade or commerce." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 313 (1897).

"It cannot be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 312 (1897).

§ 74. Distinction Between Railroad and Other Corporations.

"The points of difference between the railroad and other corporations are many and great. It cannot be disputed that a railroad is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature. The company may not charge unreasonable prices for transportation, nor can it make unjust discriminations nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 321–322 (1897).

§ 75. Distinction Between Private Individuals and Railroads.

"The trader or manufacturer, on the other hand, car-

ries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction; while, on the contrary, a railroad company must transport all persons and property that comes to it, and it must do so at the same price for the same service, and the price must be reasonable, and it cannot at its will discontinue its business." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 320–321 (1897). See, however, section 2 of the Clayton Act, now making it unlawful even for private persons to discriminate, with certain exceptions.

§ 76. Correction of Evils Common to both Railroads and Individuals.

"It is entirely appropriate generally to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business; but when the evil to be remedied is similar in both kinds of corporations, such as contracts which are unquestionably in restraint of trade, we see no reason why similar rules should not be promulgated in regard to both, and both be covered in the same statute by general language sufficiently broad to include them both." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 324–325 (1897).

§ 77. Public Entitled to Free Competition Between Railroads.

"In my judgment, the right to insist upon free competition between railway companies engaged in carrying on interstate commerce is a right which belongs to the public,

of which it cannot be deprived except by its own consent, and every contract or combination between these public corporations which tends to remove the business carried on by them from the influence of free competition tends to deprive the public of this right, of necessity tends to subject interstate commerce to burdens which are a restraint thereon, is inimical to the public welfare, is contrary to public policy, and in contravention of both the language and spirit of the anti-trust act of July 2, 1890." (SHIRAS, *District Judge.*) *U. S.* v. *Trans-Missouri Freight Assn.*, 58 Fed. 58, 100. (C. C. A. Eighth Circuit, 1893.)

§ 78. Prevention of Transportation.

If the purposes of the combination were "to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and at the other end after physical transportation ended is immaterial." (*Mr. Chief Justice* FULLER.) *Loewe* v. *Lawlor*, 208 U. S. 274, 301 (1908).

The provisions of the Sherman Law are broad enough to reach a combination or conspiracy that would interrupt the transportation of commodities from one state to another, and "any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in transporting the interstate commerce of the country is a violation of the Act of July 2, 1890." (MORROW, *District Judge.*) *In re Grand Jury*, 62 Fed. 840, 842. (D. C.—N. D. California, 1894.)

"A combination whose professed object is to resist the operation of railroads whose lines extend from a great city into adjoining states, until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is

certainly an unlawful conspiracy in restraint of commerce among the states. Under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose by unlawful means." (THAYER, *District Judge.*) *U. S.* v. *Elliott*, 62 Fed. 801, 803. (C. C.—E. D. Missouri, E. D. 1894); *U. S.* v. *Elliott*, 64 Fed. 27, 33. (C. C.—E. D. Missouri, 1894.)

"The primary object of the statute was, undoubtedly, to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. *U. S.* v. *Patterson*, 55 Fed. 605. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities and persons from one state to another." (MORROW, *District Judge.*) *U. S.* v. *Cassidy*, 67 Fed. 698, 705. (D. C.—N. D. California, 1895.)

§ 79. Consolidation by Transfer of Dominating Stock Interest.

"The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates." (*Mr. Justice* DAY.) *U. S.* v. *Union Pac. Ry. Co.*, 226 U. S. 61, 88 (1912).

A more effectual form of combination to secure the control of a competing railroad than for one road to acquire a dominating stock interest in the other could hardly be conceived. If it be true that such a stock interest was obtained with a view of destroying or restricting interstate trade, the transaction is within the terms of the

statute. *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 86 (1912).

It is provided by the Clayton Act that no corporation engaged in interstate commerce shall acquire directly or indirectly the stock in whole or in part of another corporation engaged in such commerce where the effect is to substantially lessen competition, restrain commerce or to create a monopoly, excepting, however, where the acquisition of stock was solely for investment purposes, or where the stock acquired was of subsidiaries or branches which were formed for carrying on the business, or where in the case of common carriers there was a holding of the stock of branches or short lines which were built as feeders to the main line or which do not compete therewith. *Clayton Act* (*Act of Oct.* 15, 1914), Sect. 7.

§ 80. Single Dominating Control in One Corporation.

It is settled that "a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable." (*Mr. Justice* DAY.) *U. S.* v. *Union Pac. R. R. Co.*, 226 U. S. 61, 85 (1912).

§ 81. Acquisition of Entire System of Competitor.

"Because it would have been lawful to gain, by purchase or otherwise, an entrance into California over the old Central Pacific, does not render it legal to acquire the entire system, largely engaged in interstate commerce in competition with the purchasing road." (*Mr. Justice* DAY.) *U. S.* v. *Union Pac. R. R. Co.*, 226 U. S. 61, 93 (1912).

§ 82. Use of Auxiliary Lines.

"I know of no principle of common law which forbids an individual railroad corporation, or two or three or more corporations, from selecting as to which one or two or more corporations they will employ, as auxiliary to their own lines, as the agency by which they will send freight beyond their own lines, or as their agent to receive freight on the auxiliary line to be transmitted to their own line upon through bills, and without breaking bulk." (LACOMBE, *Circuit Judge.*) *Prescott & A. C. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 73 Fed. 438, 439. (C. C.—S. D. New York, 1896.)

§ 83. Combination Compelling Use of Single Terminal.

Where the combination of terminal companies into a single system is under such inherent conditions that any other reasonable means of entering the terminal is prevented, and independent companies are under compulsion to use such single system, such combination violated both the first and second sections of the act. *U. S.* v. *St. Louis Terminal*, 224 U. S. 383, 409 (1911).

§ 84. Competition may be by Character of Service Rendered.

Competition consists not only in making rates but includes the *character of services rendered.* Advantages in such respects may be the subject of representation and the basis of solicitation by many active opposing agencies of their respective competitors. *U. S.* v. *Union Pac. R. R. Co.*, 226 U. S. 61, 87 (1912).

§ 85. Comparative Insignificance of Competition Substantial in Amount.

That the amount of competitive business was a comparatively small part of the sum total of the interstate

commerce carried on by a concern is immaterial if in fact the competing traffic were not a negligible part, but a substantial part of the interstate commerce directly affected. *U. S.* v. *Union Pac. R. R. Co.*, 226 U. S. 61, 88–89 (1912).

§ 86. No Right to Combine to Maintain Reasonable Rates.

"The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it." (*Mr. Justice* PECKHAM.) *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 339. (C. C. A. Eighth Circuit, 1897.)

§ 87. Redress from Unreasonable Rates not Limited to Interstate Commerce Commission.

A plaintiff is not obliged to proceed invariably under the Interstate Commerce Act for redress in case of an unreasonable rate imposed by a railroad company. If such unreasonable rate is one of the means employed to restrain trade or effect a monopoly, there is no reason why the

plaintiff cannot invoke the relief granted by the Sherman Act. *Meeker* v. *Lehigh Valley Railroad Co.*, 183 Fed. 548, 551. (C. C. A. Second Circuit, 1910.) But see *American Union Coal Co.* v. *Penn. Ry. Co.*, 159 Fed. 278. (C. C.—E. D. Pennsylvania, 1908.)

CHAPTER V

LABOR ORGANIZATIONS

§ 88. Effect of Clayton Act upon Labor Organizations.

By the sixth section of the Clayton Act, it is provided that "the labor of a human being is not a commodity or article of commerce," and that "nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof." So far, the provision is merely declaratory of the law as it generally existed prior to the Act and merely refers to organizations legitimately formed and not designed to interfere with the business and commerce of the country. The section, however, further provides that neither such organizations nor the members thereof "shall be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws." This language is somewhat ambiguous and taken literally would seem to mean that under no circumstances or state of facts could such organizations or their members come within the prohibitions of the laws. But obviously this cannot be the case, and the language should be interpreted to mean that so long as such organizations or members thereof did not substantially monopolize or restrain trade, and kept within legitimate bounds, they would not *per se*

be illegal combinations or conspiracies. In this view, it is difficult to see just what the section has added to the present law on the subject, and it would seem that the rule still holds that there may be combinations or conspiracies of either capitalists or laborers in violation of the anti-trust laws, and that all combinations in restraint of interstate commerce are forbidden without reference to the character of the persons who entered into them. *U. S.* v. *Workingman's Amalg. Council*, 54 Fed. 994, 996 (C. C.—E. D. Louisiana, 1893); *U. S.* v. *Debs*, 64 Fed. 724, 754–755 (C. C.—N. D. Illinois, 1894); *Address of Ex-President Taft to Am. Bar Asso.*, Washington, D. C., Oct. 20–22, 1914. But see "Labor Legislation in the Clayton Act" by Wickersham, U. P. Alumni Register, December, 1914.

§ 89. Peaceful Termination of Employment, Persuasion of Others, and Cessation of Patronage.

In the latter part of section twenty of the Clayton Act appear provisions which render lawful acts verging upon picketing, boycotting and interference with contract, etc., provided they are accomplished, peacefully, that is, without force or violence. This section provides that none of the following acts are to be considered or held violations of any law of the United States: (a) the termination of any relation of employment by any person or persons whether singly or in concert; (b) the ceasing of such persons to perform any work or labor or the recommending, advising or persuading others by peaceful means so to do; (c) the attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information; (d) peacefully persuading any person from working or abstaining from working; (e) ceasing to patronize or employ any party to such dispute, or

from recommending, advising, or persuading others by peaceful and lawful means so to do; (f) paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; (g) peacefully assembling in a lawful manner and for lawful purposes; (h) or any act or thing which might lawfully be done in the absence of such dispute by any party thereto. *Act of October 15, 1914 (Clayton Act)*, Sect. 20.

§ 90. Acts of Violence or Coercion by Laborers or Capitalists. Notwithstanding the above provisions, however, it does not appear that labor organizations or the members thereof are thereby given unbridled license to restrain interstate commerce by acts of violence, coercion, or intimidation, or to conspire or combine for the accomplishment of any such purposes, and it would seem that the language and holdings of the prior decisions as hereinafter cited are still substantially in point.

This Sherman Law "was intended to lay its strong hand, not only upon the capitalists or monopolists who, by combinations, undertook to interfere with the business and commerce of the country, and subject them to punishment, but, on the other hand, it also undertook to say to the laboring men of the country that 'you shall not enforce your rights, however just they may be, by violence and by lawlessness.'" (BAKER, *District Judge.*) *U. S.* v. *Agler*, 62 Fed. 824, 825 (C. C. Indiana, 1894); *U. S.* v. *Workingmen's Amalg. Council*, 54 Fed. 994. (C. C.—E. D. Louisiana, 1893.)

The Sherman Law covers "any illegal means by which interstate commerce is restrained whether by unlawful combinations of capital, or unlawful combinations of labor, and whether the restraints be occasioned by unlawful con-

tracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matters." (*Mr. Justice* LAMAR.) *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 438 (1910); *Eastern States Retail Lumber Dealers' Asso.* v. *U. S.*, 234 U. S. 600, 611 (1913).

§ 91. Organizations of Farmers or Laborers.

Organizations of farmers or laborers are not exempt from the operation of the Sherman Anti-Trust Act. The Act made no distinction between classes of people. *Loewe* v. *Lawlor*, 208 U. S. 274, 301 (1908).

§ 92. Compelling Employment of none but Union Men.

"The combination setting out to secure and compel the employment of none but union men in a given business, as a means to effect this compulsion, finally enforced a discontinuance of labor in all kinds of business, including the business of transportation of goods and merchandise which were in transit through the city of New Orleans, from state to state, and to and from foreign countries. When the case is thus stated,—and it must be so stated to embody the facts here proven,—I do not think there can be any question but that the combination of the defendants was in restraint of commerce." (BILLINGS, *District Judge.*) *U. S.* v. *Workingmen's Amalg. Council*, 54 Fed. 994, 999. (C. C.—E. D. Louisiana, 1893.)

§ 93. No Right to Prevent by Coercion Employment of Other Mechanics.

"The mechanic is not obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair; but he has no right

to say that no other mechanic shall make them for less. Should the journeymen bakers refuse to work unless for enormous wages, which the master bakers could not afford to pay, and should they compel all journeymen in the city to stop work, the whole population must be without bread; so of journeymen tailors or mechanics of any description. Such combinations would be productive of derangement and confusion, which certainly must be injurious to trade." (*Mr. Chief Justice* SAVAGE.) *People* v. *Fisher*, 14 Wend. 18, quoted in *U. S.* v. *Workingmen's Amalg. Council*, 54 Fed. 994, 1000. (C. C.—E. D. Louisiana, 1893.)

§ 94. Wanton Injury to Property of Employer.

Where men conspire and combine together, not only for the purpose of securing better conditions and wages under penalty of quitting the service if not secured, but also to prevent their employer from supplying the places vacated with other employees, who are ready and willing to take their places, they are within the prohibitions of the Act; such employers have no right to combine and confederate together for the purpose of wantonly injuring and destroying the property of their employer, or for obstructing and interfering with his dominion over and control of his private property. *U. S.* v. *Elliott*, 64 Fed. 27, 32. (C. C.—E. D. Missouri, 1894.)

§ 95. Agreement not to Work in Non-Union Shop.

The mere agreement of local unions of carpenters and joiners throughout the United States not to work on woodwork coming from a non-union shop necessarily and directly restrains interstate commerce in violation of the Act. *Irving* v. *Neal*, 209 Fed. 471, 476–477. (D. C.—E. D. New York, 1913.)

§ 96. Employees of Railroad Companies.

Where the employees of the Pullman Palace Car Company left its employ because of a reduction of wages, and later joined a railway union the members of which had voted to take measures to compel the said company to re-employ such employees, and where in case of refusal every effort by said union including said employees was to be made to force the railroad companies to refuse to haul the cars of the Pullman Company until such demands were complied with, and intimidation and secret terrorism were exercised to accomplish such purposes, the combination thereby effected is unlawful and is a conspiracy within the Sherman Law. *Thomas* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803. (C. C.—S. D. Ohio, 1894.)

§ 97. Arresting Operation of Railroad.

"A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining states, until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states." (THAYER, *District Judge.*) *U. S.* v. *Elliott*, 62 Fed. 801, 803 (C. C.—E. D. Missouri, E. D. 1894); *U. S.* v. *Elliott*, 64 Fed. 27, 33. (C. C.—E. D. Missouri, 1894.)

§ 98. Restrictive Rule of Association of Locomotive Engineers.

A rule of a certain brotherhood of locomotive engineers to the effect that no member shall handle property belonging to any railroad company, with which the said brotherhood may be at issue, in any way that may benefit said company, until the differences have been amicably settled,

is in direct and positive violation of the laws of the land, and an agreement in restraint of commerce within section one of the Sherman Law. *Waterhouse* v. *Comer*, 55 Fed. 149, 155–156. (C. C.—W. D. Georgia, S. D. 1893.)

§ 99. Equal Protection to Labor and Capital.

"Under our Constitution and laws, no undue advantages are given either to capital or labor, nor will the courts ever permit individuals or labor organizations by force, fraud or intimidation to prevent the mineowner from lawfully protecting his rights; but, while this is true, equal protection should be guaranteed to labor and capital." (PRITCHARD, *Circuit Judge.*) *Mitchell* v. *Hitchman Coal & Coke Co.*, 214 Fed. 685, 704. (C. C. A. Fourth Circuit, 1914.)

§ 100. Lawful and Peaceable Methods.

"In no instance should a union be restrained from using lawful and peaceable methods for the purpose of maintaining its organization, but, while this is true, the court should restrain those who by violence, coercion, and intimidation seek to deprive the mineowner of the right to use his property as he sees fit." (PRITCHARD, *Circuit Judge.*) *Mitchell* v. *Hitchman Coal & Coke Co.*, 214 Fed. 685, 716. (C. C. A. Fourth Circuit, 1914.)

§ 101. Right to Strike Peaceably.

"The right of men to strike peaceably and the right to advise a peaceable strike, which the law does not presume to be impossible, is not questioned. But if men enter into a conspiracy to do an unlawful thing, and, in order to accomplish their purpose, advise workmen to go upon a strike, knowing that violence and wrong will be the probable outcome, neither in law nor in morals can they escape responsibility." (WOODS, *Circuit Judge.*) *U. S.* v. *Debs*, 64 Fed. 724, 763. (C. C.—D. N. Illinois, 1894.)

§ 102. Ceasing to Work at Will of Union.

A rule of a labor union is not unlawful which requires its members to cease to work whenever called upon by the organization. "Common experience teaches us that a rule of this character is essential for the preservation of labor organizations. Without a provision of this kind, there would be no power of securing concert of action; no means by which united effort could be secured for the accomplishment of the aims and purposes of the organization. In the absence of proof to the contrary it must be assumed that this power would be exercised wisely, and only when necessary to promote the interest of the organization in a legitimate manner." (PRITCHARD, *Circuit Judge.*) *Mitchell* v. *Hitchman Coal & Coke Co.*, 214 Fed. 685, 700–701. (C. C. A. Fourth Circuit, 1914.)

§ 103. Presumption of Employment of only Lawful Methods.

"It has been repeatedly held by the courts that a labor union may use all lawful methods for the purpose of inducing others to join its order, and, until the contrary is shown, it must be assumed that only lawful methods are to be employed for the accomplishment of such purpose." (PRITCHARD, *Circuit Judge.*) *Mitchell* v. *Hitchman Coal & Coke Co.*, 214 Fed. 685, 702. (C. C. A. Fourth Circuit, 1914.)

§ 104. Enjoining from Quitting Service.

While a court of equity has no right under any circumstances by injunction, to prevent one individual from quitting the service of another, the recognition by the court of such right gives no warrant to any one to intimidate or abuse any individual who is willing to take employment, or to interfere directly with the management and operation of the business in which such individual is

employed. *U. S.* v. *Debs*, 64 Fed. 724, 763, 766. (C. C.—N. D. Illinois, 1894.)

§ 105. Resort to Coercion, Threats, Intimidation or Violence.

"If the United Mine Workers of America . . . should resort to coercion, threats, intimidation, or violence for the purpose of preventing the mineowner from employing non-union men, such conduct would be unlawful, and the courts would promptly restrain any one who might be a party to such transaction. Indeed it would be unlawful for an individual to undertake, by coercion, intimidation, or threats to prevent a mineowner from exercising his own free will as to the employment of non-union laborers, or as to any other thing which he might deem necessary to be done in order to protect his property rights." (PRITCHARD, *Circuit Judge.*) *Mitchell* v. *Hitchman Coal & Coke Co.*, 214 Fed. 685, 703. (C. C. A. Fourth Circuit, 1914.)

§ 106. Black Listing by Labor Unions of Unfair Dealers.

"Irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the Sherman Act if it is intended to restrain and restrains commerce among the States." (*Mr. Justice* HOLMES.) *Lawlor* v. *Loewe*, 235 U. S. 522, 534 (1915).

CHAPTER VI

GENERAL CONSTRUCTION OF THE ENUMERATED OFFENSES

§ 107. Growing Liberality of Construction.

Since the passage of the Sherman Law in 1890, it has been the constant endeavor of defendants to restrict the scope of its provisions and to narrow the field of its application. In such effort they were at first apparently successful and prosecutions under the Act were discouraged, but as time has gone on, there has been an ever increasing tendency on the part of the courts so to interpret the statute as to repress the evil it was designed to reach and apply the remedy, and to disregard so far as possible formal or inconsequential considerations.

Although such tendency has been most marked in civil proceedings it is beginning to appreciably influence the construction placed upon criminal indictments, in view of the vast, growing and threatening influence, exerted by great combinations of capital and the constant concentration of business enterprises effected thereby. In some districts, however, the strictness of construction called for at common law is rigidly adhered to in all criminal actions instituted under the Act almost without exception, although even in such jurisdictions in civil causes, the menace to the people and the potential power for injury of illegal combinations appears to be recognized and dealt with accordingly.

The offenses prohibited by the Act are mainly set forth in sections one and two, the boundaries and entire length

and breadth of which have often been disputed territory in the federal courts. The language of these sections is as follows:

§ 108. First Section (Restraint of Trade).

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court."

§ 109. Second Section (Monopoly).

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

§ 110. Modes of Giving Effect to the Law.

Since the passage of the Clayton Act, there are now six modes in which effect may be given in whole or in part to the provisions of the anti-trust laws, (1) by a criminal proceeding; (2) by a suit in equity brought by the government; (3) by a proceeding in equity under the Clayton Act in behalf of a person, firm, corporation or association;

(4) by a proceeding for forfeiture in the name of the United States; (5) by a law action by a person or corporation for the recovery of treble damages; and (6) by proceedings to enforce compliance with certain sections of the Clayton Act instituted by the commission or board having jurisdiction. *The Sherman Law* (Act of July 2, 1890), Sects. 4, 6, and 7; *The Clayton Act* (Act of Oct. 15, 1914), Sects. 4, 11, 15 and 16.

§ 111. Constitutionality.

It is well settled that the Sherman Law as a criminal statute is constitutional, and that there is no constitutional difficulty in the way of enforcing its provisions on the ground of uncertainty. *Nash* v. *U. S.*, 229 U. S. 373, 377–378 (1913); *U. S.* v. *New Departure Co.*, 204 Fed. 107, 114 (D. C.—W. D. New York, 1913); *U. S.* v. *Patterson*, 201 Fed. 697, 706–715 (D. C.—S. D. Ohio, W. D. 1912); *U. S.* v. *Winslow*, 195 Fed. 578, 584. (D. C. Mass. 1912.)

§ 112. Primary Object of Statute.

"The primary object of the statute was undoubtedly to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts grasping, engrossing and monopolizing the markets for commodities." (MORROW, *District Judge.*) *In re Grand Jury*, 62 Fed. 840, 841. (D. C.—N. D. California, 1894.)

§ 113. Fear of Powerful Combinations.

"It may well be assumed that Congress when enacting that statute (the Sherman Act), shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain such absolute control of the entire trade and commerce

of the country as would be detrimental to the general welfare." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 339 (1904).

§ 114. Power of Congress Exclusive.

"The power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints." (*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight*, 156 U. S. 1, 11 (1895).

§ 115. Public Welfare the First Consideration.

The public welfare is the first consideration to which the courts will look, and then the question of whether the restraint upon the one party is or is not greater than the protection of the other requires. When the contract encroaches upon the rights of the public and transgresses the liberty of free competition, public welfare becomes paramount and must predominate over any individual right to contract. *Anderson* v. *Shawnee Compress Co.*, 87 Pac. 315, 317. (Oklahoma Supreme Court, 1906.)

§ 116. Whole Statute must be Taken Together.

"Moreover, it is important to note the rule that this whole statute must be taken together. The second section is limited by its terms to monopolies, and evidently has as its basis the engrossing or controlling of the market. The first section is undoubtedly in pari materia, and so has as its basis the engrossing or controlling of the market, or of lines of trade." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Patterson*, 55 Fed. 605, 640. (C. C. Mass. 1893.)

§ 117. Historical Environment.

"In construing statutes the courts shall not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of its enactment." (SATER, *District Judge.*) *Mannington* v. *Hocking Valley Ry. Co.*, 183 Fed. 133, 154. (C. C.—S. D. Ohio E. D. 1910.)

§ 118. Debates in Congress.

"It is apparently settled law that we cannot take the views or purposes expressed in debate as supplying the construction of statutes. In *U. S.* v. *Union Pacific R. Co.*, 91 U. S. 72–79, and elsewhere, the supreme court has laid down this rule. But this does not at all touch the question whether or not one can gather from the debates in congress, as he can from any other source, the history of the evil which the legislation was intended to remedy." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Patterson*, 55 Fed. 605, 641. (C. C.—Mass. 1893.)

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *U. S.* v. *Union Pacific Railroad Company*, 91 U. S. 72, 79; *Aldridge* v. *Williams*, 3 How. 9, 24, TANEY, *Chief Justice; Mitchell* v. *Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen* v. *Hartford College*, 3 Q. B. D. 693, 707." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 318 (1897).

While debates may not be used as a means for interpreting a statute, debates may nevertheless be resorted to as

a means of ascertaining the environment at the time said statute was enacted. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 49 (1911); *U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 318 (1897).

§ 119. Necessary Restriction of Meaning of General Words.

"Our attention is also called to one of the rules for the construction of statutes which has been approved by this court; that while it is the duty of courts to ascertain the meaning of the legislation from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so in order to carry out the legislative intent." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 320 (1897).

§ 120. Intent of Statute.

"In the construction of statute, the intent of the law-makers must be found in the statutes themselves. The first resort is to the natural, ordinary, familiar signification of the words employed. If a law is plain and unambiguous, . . . it must be held that the law-making body meant what it plainly expressed." (SATER, *District Judge.*) *Mannington* v. *Hocking Valley Ry. Co.*, 183 Fed. 133, 155. (C. C.—S. D. Ohio, E. D. 1910.)

§ 121. Literal Construction of Statute.

A legislative act should not be construed "in a literal manner where it is clear that by such construction the legislative purpose will be defeated." Accordingly "the language of the (Sherman) Anti-Trust Act is not to receive that literal construction which will impair rather than enhance the freedom of interstate commerce." (LANNING, *Circuit Judge.*) *U. S.* v. *Du-Pont De Nemours & Co.*, 188 Fed. 127, 149, 151. (C. C. Delaware, 1911.)

§ 122. General Expressions in Legal Decisions.

"It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all cases is seldom completely investigated." (*Mr. Chief Justice* MARSHALL.) *Cohens* v. *Virginia*, 6 Wheat. 264, 340, 399, quoted by TAFT, *Circuit Judge*, in *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 300. (C. C. A. Sixth Circuit, 1898.)

The rule is settled that "general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment of subsequent suits." (*Mr. Chief Justice* FULLER.) *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291 (1905).

§ 123. Lateness of Enactment.

"The fact that Congress did not enact the statute above recited until 1890, is no argument against the existence of its power. Many powers lodged by the constitution in the legislative department long lie dormant, until the exigency arises to invoke them into activity." (PHILIPS, *District Judge.*) *U. S.* v. *Elliott*, 64 Fed. 27, 34. (C. C.—E. D. Missouri, 1894.)

§ 124. Statute Covers all Illegal Means for Restraining Interstate Commerce.

The statute covers any illegal means by which inter-

state commerce may be restrained, whether the restraint be occasioned by unlawful combinations of capital or unlawful combinations of labor, and whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, black lists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 438 (1911).

§ 125. Undue Restraint of Competition or Trade.

The Standard Oil Co. and *American Tobacco Co. Cases* "may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by *unduly restricting competition or unduly obstructing the course of trade.*" (*Mr. Justice* HOLMES.) (Italics mine.) *Nash* v. *U. S.*, 229 U. S. 373, 376 (1913).

"The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and *unduly* suppress or restrict the play of competition in the conduct thereof." (*Mr. Justice* DAY.) (Italics mine.) *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 82 (1912).

"To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment." (*Mr. Justice* DAY.) *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 87 (1912).

It is not sufficient merely to show that an alleged agreement restrained trade; in order to warrant a conviction under the Sherman Act, there must be not only a restraint of trade but an undue restraint. It must be shown that

the restraint was an unreasonable one in order to be prohibited by the Act. *U. S.* v. *Whiting*, 212 Fed. 466, 473 et seq. (D. C. Mass. 1914.)

"Contracts and methods of business, which do in fact restrain or interfere with competition, are not to be held obnoxious to the provisions of the act, unless such restraint or interference is 'unreasonable' or 'undue.'" (LACOMBE, *Circuit Judge.*) *U. S.* v. *Hamburg-American S. S. Line*, 216 Fed. 971, 972. (D. C.—S. D. New York, 1914.)

§ 126. Unreasonably Restrictive of Competitive Conditions.

The Sherman Law must be construed as intended to reach only such acts, contracts, agreements or combinations which are unduly restrictive of the flow of commerce, or unduly restrictive of competition, all contracts, acts, etc., which are unreasonably restrictive of competitive conditions being classed as illegal. *Eastern States Lumber Assn.* v. *U. S.*, 234 U. S. 600, 610 (1914); *Nash* v. *United States*, 229 U. S. 373, 376 (1913); *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 58 (1911).

§ 127. Restraint of Competition.

"There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the Anti-Trust Act was passed, a definite legal signification. Not every combination in restraint of competition, was, in a legal sense, in restraint of trade. . . . It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain trade or commerce among the several states. . . . There

may be, under the Anti-Trust Act restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common law restraint of trade." (LANNING, *Circuit Judge.*) *U. S.* v. *E. I. Du Pont De Nemours & Co.*, 188 Fed. 127, 150–151. (C. C. Delaware, 1911.)

§ 128. Suppression of Competition.

"Suppression of competition, where the parties to a combination control a large portion of the interstate or foreign commerce in the article, and where there is no obligation to form the combination arising out of the fact that the parties to the same are losing money, or the like, has been held to be an undue restraint of trade." (SMITH, *Circuit Judge.*) *U. S.* v. *International Harvester Co.*, 214 Fed. 987, 998. (D. C. Minnesota, 1914) and cases cited.

§ 129. Act is Broader than the Common Law.

Whatever may be the meaning given to monopoly or restraint of trade or the precise offenses set forth in sections one and two, it would appear that the Act must be given a broader application than the mere non-enforcement or prohibition of restraints, illegal at common law, there being now embraced every conceivable act which could possibly come within the spirit or purpose of prohibitions of the law without regard to the garb in which such acts were clothed. *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 181 (1911).

The decisions of the federal courts prior to the *Standard Oil Company* and *American Tobacco Co. Cases* enunciate very clearly the view that the Sherman Act has a broader application than the prohibition of restraints of trade at common law. *Loewe* v. *Lawlor*, 208 U. S. 274, 297 (1908),

citing *Northern Securities Co.* v. *U. S.*, 193 U. S. 197 (1904); *U. S.* v. *Joint Traffic Assn.*, 171 U. S. 505 (1898); *U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897).

§ 130. Abatement of Evil and Application of Remedy.

It is the duty of the court so to construe the Act as to repress the evil and apply the remedy. The evil aimed at is of such national importance that the remedies provided for its punishment and repression should not be unduly restricted or limited by precise definition. The public policy embodied in the statute must be applied and enforced regardless of disguise or subterfuge of form. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 61, 63–64 (1911); *U. S.* v. *Am. Tobacco Co.*, 221 U. S. 106, 180–181 (1911); *Ware-Kramer Tobacco Co.* v. *Am. Tobacco Co.*, 178 Fed. 117, 125. (C. C.—E. D. North Carolina, 1910.)

The Act should be so construed as to effectuate the purposes for which it was enacted and the mischief it was passed to destroy must be reached and abated. *American Biscuit, etc., Co.* v. *Klotz*, 44 Fed. 721, 725. (C. C.—E. D. Louisiana, 1891); *Monarch Tobacco Works* v. *Am. Tobacco Co.*, 165 Fed. 774, 778 (C. C.—W. D. Kentucky, 1908); *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 191. (C. C.—E. D. Missouri, E. D. 1909.)

§ 131. Generic Enumeration of Offenses in Act.

"The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, *that it was expressly designed not to unduly limit the application of the act by precise definition*, but while clearly fixing a standard, that is, *by defining the ulterior boundaries which could not be transgressed with impunity*, to leave it to be determined by

the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute." (*Mr. Chief Justice* WHITE.) (Italics mine.) *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 63–64 (1911).

The general language of the act indicates that "Congress being unable to foresee and describe all the plans that might be formed and all the expedients that might be resorted to to place restraints on interstate commerce, deliberately employed words of such general import as, in its opinion, would comprehend every scheme that might be devised to accomplish that end." (THAYER, *Circuit Judge.*) *U. S.* v. *Northern Securities Co.*, 120 Fed. 721, 724. (C. C. Minnesota, Third Division, 1903.)

§ 132. Free Flow of Commerce must not be Impeded.

"The Act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business." (*Mr. Chief Justice* FULLER.) *Loewe* v. *Lawlor*, 208 U. S. 274, 293 (1908); *U. S.* v. *Am. Tobacco Co.*, 221 U. S. 106, 179–180 (1911).

"The clear and positive purpose of the statute must be understood to be that trade and commerce within the jurisdiction of the federal government shall be absolutely free, and no contract or combination will be tolerated that impedes or restricts their natural flow and volume." (MORROW, *Circuit Judge.*) *U. S.* v. *Coal Dealers' Assn.*, 85 Fed. 252, 262. (C. C.—N. D. California, 1898.)

"The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the

play of competition in the conduct thereof." (*Mr. Justice* DAY.) *U. S.* v. *Union Pac. Ry. Co.*, 226 U. S. 61, 82 (1912).

§ 133. All Circumstances Taken into Account.

"In passing upon the question of unreasonable restraint, all the circumstances surrounding the alleged agreement or combination are to be taken into account. And, while the standard of conduct 'in its nature and theory is a question of law,' . . . where the facts are in dispute the question will ordinarily be one for the jury to decide under suitable instructions." (MORTON, *District Judge.*) *U. S.* v. *Whiting*, 212 Fed. 466, 474. (D. C. Mass. 1914.)

Contracts containing covenants in restraint of trade must be "judged according to their circumstances and can only be rightly judged when the reasons and grounds of the rule (of the construction of such contracts) are carefully considered." (*Mr. Justice* BRADLEY.) *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64, 68 (1873); *Anderson* v. *Shawnee Compress Co.*, 87 Pac. 315, 317. (Oklahoma Supreme Court, 1906.)

§ 134. Effect upon both Consumers and Competitors.

"In determining whether a combination restrains interstate commerce, it is not only the effect upon consumers which is to be considered, but, as well, the effect upon others in the business, who, from choice or necessity are left outside of the organization." (DAY, *Circuit Judge.*) *Chesapeake & O. Fuel Co.* v. *U. S.*, 115 Fed. 610, 623. (C. C. A. Sixth Circuit, 1902.)

§ 135. Legitimate Competition not Forbidden.

The act "was enacted, not to stifle, but to foster, competition, and its true construction is that, while unlawful

means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under it, monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law and may not be forbidden by the courts." (SANBORN, *Circuit Judge.*) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 191. (C. C.—E. D. Missouri, E. D. 1909.)

"Undoubtedly every person engaged in interstate commerce necessarily attempts to draw to himself, to the exclusion of others, and thereby to monopolize, a part of that trade. Every sale and every transportation of an article which is the subject of interstate commerce evidences a successful attempt to monopolize that trade or commerce which concerns that sale or transportation." If this is prohibited by the second section of the act as attempting to monopolize, then competition is forbidden and the only purpose of the law is defeated. (SANBORN, *Circuit Judge.*) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 191. (C. C.—E. D. Missouri, E. D. 1909.)

§ 136. Personal Right to Fix Price and Dictate Terms.

"The right of each competitor to fix the prices of the commodities which he offers for sale and to dictate the terms upon which he will dispose of them is indispensable to the very existence of competition. Strike down or stipulate away that right, and competition is not only restricted, but destroyed." (SANBORN, *Circuit Judge.*) *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 459. (C. C. A. Eighth Circuit, 1903.)

§ 137. One Person may make Exclusive Sales of his own Merchandise.

Any person engaged in commerce among the states may

lawfully select his customers and may sell only to those who do not buy or sell the wares of his competitors, such a restriction of his own trade by manufacturer or merchant not being in restraint of trade or an attempt to monopolize any part of trade within meaning of the act. *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 456. (C. C. A. Eighth Circuit, 1903.) See, however, section 3 of Act of October 15, 1914 (Clayton Act).

"An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself and to exclude others from a part of that trade." (SANBORN, *Circuit Judge.*) *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 462. (C. C. A. Eighth Circuit, 1903.)

§ 138. Lawful Combination Turned to Unlawful Purposes.

While a corporation in its origin and purposes may be innocent and lawful, yet "associations of men, like individuals, no matter how worthy their general character may be, when charged with unlawful combinations, and when the charge is fully established, cannot escape liability on the ground of their commendable general character." (BILLINGS, *District Judge.*) *U. S.* v. *Workingmen's Amalg. Council*, 54 Fed. 994, 999. (C. C.—E. D. Louisiana, 1893.)

§ 139. Control of Rates and Prices.

"The purpose of this statute was to keep the rates of transportation and the prices of articles in interstate and international commerce open to free competition. Any contract or combination of two or more parties, whereby the control of such rates or prices is taken from separate

competitors in that trade, and vested in a person or association of persons, necessarily restricts competition and restrains that commerce." (SANBORN, *Circuit Judge.*) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 184. (C. C.—E. D. Missouri, E. D. 1909.)

§ 140. Reasonable Construction of Statute.

"The statute should be given a reasonable construction, with a view to reaching those undue restraints of interstate trade which are intended to be prohibited and punished, and in those cases (the *Standard Oil Co. & Tobacco Co. Cases*), it is clearly stated that the decisions in the former cases had been made upon an application of that rule and there was no suggestion that they had not been correctly decided." (*Mr. Justice* DAY.) *U. S.* v. *Union Pac. Ry. Co.*, 226 U. S. 61, 84 (1912).

"The act of Congress must have a reasonable construction, or else there would be scarcely an agreement or contract among business men that could not be said to have indirectly or remotely some bearing upon interstate commerce and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 600 (1898); *Anderson* v. *U. S.*, 171 U. S. 604, 616 (1898); *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 254, 459 (C. C. A. Eighth Circuit, 1903); *U. S.* v. *Joint Traffic Asso.*, 171 U. S. 505, 568 (1898); *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 179 (1911).

§ 141. Standard of Reason at Common Law.

The standard of reason applied at common law and in the country for determining the meaning of restraint of trade is intended to be the measure used for the purpose of determining whether or not in a given case the wrong

complained of is within the statute. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 60, (1911).

§ 142. Test of Reasonable Restraint.

"Where the restraint is partial, either as to time or place, its validity is to be determined by its reasonableness and the existence of a consideration to support it. The question of its reasonableness depends on the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is secured." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 118. (C. C.—S. D. Ohio, W. D. 1892.)

"We do not see how a better test can be applied to the question whether this is or is not a reasonable restraint of trade than by considering whether *the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.* Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy." (*Lord* MACNAGHTON). (Italics mine.) *Nordenfelt* v. *Maxim-Nordenfelt Co.* (1894), App. Cas. 535, 567; *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282. (C. C. A. Sixth Circuit, 1898.)

"No conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282. (C. C. A. Sixth Circuit, 1898.)

§ 143. Materiality of Question of Reasonable or Unreasonable Restraint.

Under the recent decisions of the Supreme Court the question as to whether the restraint of trade imposed by a combination is reasonable or unreasonable is not now immaterial. *Union Castle Mail S. S. Co.* v. *Thomsen*, 190 Fed. 536, 537. (C. C. A. Second Circuit, 1911.)

Although in a number of decisions of the federal courts prior to the decisions in the *Standard Oil Co.* and *American Tobacco Co. Cases*, dicta may be found to the effect that it is immaterial whether a restraint of trade is illegal as being reasonable or unreasonable in the common law sense, such dicta have now been overruled or their effect limited and qualified. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 67–68 (1911).

§ 144. The Rule of Reason.

The words "rule of reason" as applied in the *Standard Oil Company* and *American Tobacco Company Cases*, have given rise to much unprofitable discussion and speculation, it appearing all the court desired to convey by this phrase was that the standard of reason at common law was to be employed as a test, and that in the last analysis the Sherman Law like all other statutes should receive a reasonable construction. Thus, under the Sherman Law the said standard of reason is to be invoked in deciding whether undue limitations have been imposed upon interstate competitive conditions, or whether obstructions have been raised which are unduly restrictive of the flow of trade in the channels of interstate or foreign commerce. The effect of the two cases above mentioned is popularly supposed to have read into the Sherman Law the word unreasonable as applied to both restraints of trade and monopolies, but it does not appear that the

Supreme Court went to this extreme. This is made clear in the *American Tobacco Company Case* where Mr. Chief Justice White states, referring to the *Standard Oil Company Case* (see 221 U. S. 106, 179–180): "In other words, it was held, *not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable*, but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect." (Italics mine.)

§ 145. Scope of First and Second Sections Taken Together.

No disguise or subterfuge of form can avail. The generic designation of the first and second sections of the law, when taken together, "embrace every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts are clothed." (*Mr. Chief Justice* WHITE.) *U. S.* v. *Amer. Tobacco Co.*, 221 U. S. 106, 181.

§ 146. Subject-Matter of First and Second Sections.

"There can be no doubt that the sole subject with which the first section deals is *restraint of trade* as therein contemplated, and that the *attempt to monopolize*, and *monopolization* is the subject with which the second section is concerned." (*Mr. Chief Justice* WHITE.) (Italics mine.) *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 50–51.

§ 147. The Two Sections not Identical in Scope.

"Manifestly this (second) section is quite distinct from

the first, and was not intended to cover precisely the same ground. To say otherwise would be to impute to Congress the doing of the unnecessary and useless." (SANBORN, *Circuit Judge.*) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 195. (C. C.—E. D. Missouri, E. D. 1909.)

§ 148. Second Section Broader than First.

"Though the natural tendency of a combination in restraint of trade declared illegal by section 1 may be and generally is towards monopoly denounced by section 2, and may even accomplish it, yet the scope of the latter section is far broader and was designed to extend also to monopolies secured by other means than by contracts, combinations and conspiracies in restraint of trade, which, as those terms necessarily imply, require concert between two or more persons or corporations." (SANBORN, *Circuit Judge.*) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 195. (C. C.—E. D. Missouri, E. D. 1909.)

§ 149. Second Section Supplementary to the First.

The text of the second section is intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 60 (1911).

There has been a practical evolution by which monopoly and acts which produce the same results as monopoly, that is, an undue restraint of the course of trade, have come to be spoken of as, and to be indeed synonymous with restraint of trade. That is, having by the first section forbidden all means of monopolizing trade by unduly restraining it by certain enumerated offenses, the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section,

that is, restraints of trade, by any attempt to monopolize or monopolization thereof, *even though the acts producing or tending to produce such results are not embraced within the general enumeration of the first section. Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 61 (1911).

§ 150. Second Section Includes more than Restraints of Trade at Common Law.

A careful reading of the *Standard Oil Co.* and *American Tobacco Co. Cases* would appear to indicate that if the words "restraint of trade" are to be given their common or general law meaning, that is are to be limited to the specification of offenses set forth in section one, and if section two is broader than the first and seeks to reach matters in substantial obstruction of the channels of trade not forbidden by the first section, that section two in theory at least must necessarily be extended to include matters that are not at all in restraint of trade in the common or general law sense. Accordingly in the *Standard Oil Company* and *Tobacco Company Cases*, Chief Justice White appears to use the words restraint of trade in a double sense, *first*, as indicating solely restraints of trade in the light of the existing practical conception of the general or common law, and as set forth in section one, *second*, as indicating undue restraints which were not included within the prohibitions of section one, that is, which were not restraints of trade in the common or general law sense, but which nevertheless brought about an undue obstruction to interstate or foreign trade and commerce.

CHAPTER VII

JUDICIAL INTERPRETATION OF "RESTRAINT OF TRADE" UNDER THE ACT

§ 151. Meaning of "Restraint of Trade."

The precise meaning of the words "restraint of trade" as used in the act is difficult of exact statement. It undoubtedly includes all undue restraints held to be illegal or unenforceable at common law or the general law of this country at the time of the enactment of the statute and coming within the enumerated offenses of the first section. It includes by reason of the all embracing character of said enumeration any contract or combination method "whether old or new" constituting an undue restraint, in order that no form of contract or combination could be resorted to to save such restraint from condemnation. It would, however, appear that all undue restraints, if any, outside of said enumerated offenses, and not therefore "restraints of trade or commerce" in their well recognized legal meaning, were not included in the first section but were included in the second section, such section reaching every act bringing about the prohibited results. See *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 59, 62 (1911).

§ 152. Breadth of Meaning Given to Words "Restraint of Trade."

"The words restraint of trade should be given a meaning which would not destroy the individual right of contract, and render difficult, if not impossible, any movement of

trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect." (*Mr. Chief Justice* WHITE.) *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 180 (1911); *U. S.* v. *Reading Co.*, 226 U. S. 324, 369 (1912).

§ 153. Construction Controlled by Title of Act.

"Construed literally, the terms used in the body of this act forbid all contracts or combinations in restraint of trade or commerce; but that construction is controlled by the title, which shows that only unlawful restraints were intended." (WOODS, *Circuit Judge.*) *U. S.* v. *Debs*, 64 Fed. 724, 747. (C. C.—N. D. Illinois, 1894.)

§ 154. No Affirmative Relief at Common Law.

While at common law contracts and combinations in restraint of trade were only illegal in the sense of being unenforceable, and while private wrongs could not be predicated thereon unless indictable, it does not follow that legislative authority may not create a right of private action in one who has thereby suffered injuries in business or property. *Wheeler-Stenzel Co.* v. *Nat'l Window Glass Assn.*, 152 Fed. 864, 873. (C. C. A. Third Circuit, 1907.)

"Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1892), App. Cas. 25; *Hornby* v. *Close*, L. R. 2 Q. B. 153; Lord Campbell, C. J., in *Hilton* v. *Eckersley*, 6 El. & Bl. 47, 66; Hannon, J., in *Farrer* v. *Close*, L. R. 4 Q. B. 602, 612. The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misde-

meanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 279. (C. C. A. Sixth Circuit, 1898.)

"The act of July 2, 1890, on which the present indictment is based, in declaring that contracts, combinations, and conspiracies in restraint of trade and commerce between the states and foreign countries were not only illegal, but should constitute criminal offenses against the United States, goes a step beyond the common law, in this: that contracts in restraint of trade, while unlawful, were not *misdemeanors or indictable at common law.* It adopts the common law in making combinations and conspiracies in restraint of the designated trade and commerce criminal offenses, and creates a new crime, in making contracts in restraint of trade misdemeanors, and indictable as such. But the act does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute." (JACKSON, *Circuit Judge.*) (Italics mine.) *In re Greene*, 52 Fed. 104, 111. (C. C.—S. D. Ohio, W. D. 1892.)

§ 155. "Restraint of Trade" to be Given Common Law Meaning.

"The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the

subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense." (*Mr. Chief Justice* WHITE.) *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 59 (1911); *U. S.* v. *Patten*, 226 U. S. 525, 542 (1912).

"Where the words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." (*Mr. Chief Justice* WHITE.) *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 59 (1911).

"When Congress, under and in the exercise of powers conferred by the constitution, adopts or creates common-law offenses, the courts may properly look to that body of jurisprudence for the true meaning and definition of such crimes, if they are not clearly defined in the act creating them." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 111. (C. C.—S. D. Ohio, W. D. 1892.)

"The 'restraint of trade' which is obnoxious to the provisions of the first section must be of such kind as was, before the passage of the act, recognized as unlawful." (LACOMBE, *Circuit Judge.*) *Dueber Watch Case Mfg. Co.* v. *Howard Watch Co.*, 66 Fed. 637, 643. (C. C. A. Second Circuit, 1895.)

"The phrase used in the act of 1890, viz. 'restraint of trade,' is no new one. It had theretofore been used by courts applying the doctrines of the common law in determining the validity of contracts. It is to be presumed that the law-makers, when they chose this phrase, intended that it should have, when used in the statute, no other or different meaning from that which had always been given to it in judicial decisions and in the common understanding. The title indicates that the phrase is so used, for

the act is described as one 'to protect trade and commerce against unlawful restraints and monopolies'; and, though the title to an act cannot control its words, it may furnish some aid in showing what was in the mind of the legislator." (LACOMBE, *Circuit Judge.*) *Dueber Watch Case Mfg. Co.* v. *Howard Watch Co.*, 66 Fed. 637, 643. (C. C. A. Second Circuit, 1895.)

§ 156. Statutes Changing Common Law Rules.

"Statutes are not to be interpreted to change the common law, except so far as a purpose so to do is necessarily implied." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Winslow*, 195 Fed. 579, 587. (D. C. Mass. 1912.)

§ 157. Conspiracy in Restraint of Trade not Limited to Contracts and Combinations Illegal at Common Law.

"Under the familiar rule that such federal enactments will be interpreted by the light of the common law, I have no doubt but that this statute, in so far as it is directed against contracts or combinations in the form of trusts, or in any form of a 'contractual character,' should be limited to contracts and combinations such, in their general characteristics, as the courts have declared unlawful. But to put such limitation upon the word 'conspiracy' is neither necessary, nor, as I think, permissible." (WOODS, *Circuit Judge.*) *U. S.* v. *Debs*, 64 Fed. 724, 747–748. (C. C.—N. D. Illinois, 1894.)

§ 158. Scope of "Restraint of Trade" Under the Act.

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or com-

binations which operated to the prejudice of the public interests by *unduly* restricting competition or *unduly* obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., *injuriously* restrained trade, that the words as used in the statute were designed to have and did have but a like significance." (*Mr. Chief Justice* WHITE.) (Italics mine.) *U. S.* v. *Am. Tobacco Co.*, 221 U. S. 106, 179 (1911). Quoted with approval by *Mr. Justice* DAY in *U. S.* v. *Union Pac. Ry. Co.*, 226 U. S. 61, 84 (1912).

The all embracing enumeration of the first section was "to make sure that no form of contract or combination by which an *undue* restraint of interstate or foreign commerce was brought about could save such restraint from condemnation." (*Mr. Chief Justice* WHITE.) (Italics mine.) *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 59–60 (1911).

§ 159. Actual Restraint not Prohibited.

"It is not the actual restraint of trade (if such be restraint of trade) that is made illegal by the statute, but the making of a contract in restraint of trade, of a contract which restrains or is intended to restrain trade." (LACOMBE, *Circuit Judge.*) *In re Terrell*, 51 Fed. 213, 215. (C. C.—S. D. New York, 1892.)

§ 160. General Restraint of Trade.

"It is well settled that contracts in general restraint of trade are contrary to public policy, and therefore unlawful." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 118. (C. C.—S. D. Ohio, W. D. 1892.)

§ 161. Voluntary and Involuntary Restraints.

Section one "is not confined to voluntary restraints, as

where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or restrict the common liberty to engage therein." (*Mr. Justice* VAN DEVANTER.) *U. S.* v. *Patten*, 226 U. S. 525, 541 (1912).

§ 162. All Forms of Combination in Restraint of Trade are Embraced.

"The statute in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce. The Supreme Court has repeatedly held this general phraseology embraces all forms of combination, old and new." (*Mr. Justice* DAY.) *U. S.* v. *Union Pac. Ry. Co.*, 226 U. S. 61, 85–86 (1912).

"While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 326 (1897).

§ 163. Reasonable Construction Excludes Normal and Usual Contracts, Incidental to Lawful Purposes.

"Giving the statute a reasonable construction the words 'restraint of trade' did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free." (*Mr. Chief Justice* WHITE.) *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 181 (1911).

"The statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose." (*Mr. Chief Justice* WHITE.) *U. S.* v. *Am. Tobacco Co.*, 221 U. S. 106, 179 (1911); *U. S.* v. *Union Pac. Ry. Co.*, 226 U. S. 61, 84–85 (1912); *U. S.* v. *Reading Co.*, 226 U. S. 324, 369 (1912).

The act broadly condemns all combinations and conspiracies which unduly restrain the free and natural flow of trade in the channels of interstate commerce, it not being intended to reach normal and usual contracts incident to lawful purposes and intended to further legitimate trade. *Eastern States Retail Lumber Dealers' Asso.* v. *U. S.*, 234 U. S. 600, 609–610 (1913).

§ 164. Test Whether Unusual or Wrongful.

The test to be applied is whether or not the facts of any case brought under the act "established that the acts, contracts, agreements, combinations, etc., which were assailed were of such an *unusual* and *wrongful* character as to bring them within the prohibitions of the law." (*Mr. Chief Justice* WHITE.) (Italics mine.) *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 181 (1911).

§ 165. Where Sole Purpose is Destruction of Competition.

"Agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void." (*Mr. Justice* HUGHES.) *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 408 (1911).

§ 166. Combination Formed Abroad.

A combination formed for the purpose of monopolizing or restraining the foreign commerce of the United States

is not rendered immune to the operation of the Act because such combination was entered into on foreign soil. *U. S.* v. *Hamburg-Amer., etc., Gesellshaft*, 200 Fed. 806, 807–808. (C. C.—S. D. New York, 1911); *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. 251, 253. (C. C. A. Second Circuit, 1908.)

§ 167. Direct or Indirect Effect.

It has been laid down in a series of decisions of the Supreme Court and followed in other courts, that the criterion to be employed in construing the Sherman Law is the direct or indirect effect upon interstate commerce of the acts involved; and such test is in no way departed from in the *Standard Oil Company Case* and is expressly held to be in complete accord with the rule of reason, said test and said rule in their ultimate aspect coming to one and the same thing. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 66 (1911).

§ 168. Direct and Immediate Effect.

"The statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used." (*Mr. Justice* PECKHAM.) *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 568 (1898).

"To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate

effect upon interstate commerce in order to come within the act." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 592 (1898).

"An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct." (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 594 (1898).

"Any agreement or combination, which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent trenches upon the power of the national legislature and violates the statute." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 242 (1899).

The language of the first section "is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of any number of independent dealers however small." (LACOMBE, *Circuit Judge.*) *U. S.* v. *Am. Tobacco Co.*, 164 Fed. 700, 701. (C. C.—S. D. New York, 1908.)

§ 169. Incidental or Indirect Effect.

If an alleged combination "promotes, or but incidentally or indirectly restricts competition while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation." (SANBORN, *Circuit Judge.*)

Whitwell v. *Continental Tobacco Co.*, 125 Fed. 454, 458. (C. C. A. Eighth Circuit, 1903).

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce." (*Mr. Justice* PECKHAM.) *United States* v. *Joint Traffic Association*, 171 U. S. 505, 568 (1908).

"Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object." (*Mr. Justice* PECKHAM.) *Anderson* v. *United States*, 171 U. S. 604, 615 (1898).

"The Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could be said to have directly or remotely some bearing on interstate commerce, and possibly to restrain it. (*Mr. Justice* PECKHAM.) *Hopkins* v. *U. S.*, 171 U. S. 578, 600 (1898); *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 568 (1898); *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 179 (1911).

"The act of July 2, 1890, does not denounce every com-

bination in or to conduct commerce among the states or with foreign nations but those combinations alone which restrain that commerce. It does not denounce every combination, which restrains that commerce, but those combinations only, the necessary effect of which is to stifle, or directly and substantially to restrict, free competition in that commerce." (SANBORN, *Circuit Judge.*) *Union Pacific Coal Co.* v. *U. S.*, 173 Fed. 737, 739. (C. C. A. Eighth Circuit, 1909.)

"The contract which incidentally, collaterally or remotely affects interstate commerce, although indirectly in furtherance of and advantageous to interstate commerce, is not within the scope of the act. It must appear that the effect of such a contract is direct and substantial." (RUGG, *Chief Justice.*) *United Shoe Machinery Co.* v. *LaChapelle*, 212 Mass. 467, 484 (Mass. Supreme Court, 1912).

§ 170. Necessary Construction of Contract.

"A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts." (*Mr. Justice* HOLMES.) *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 184 (1906).

§ 171. Necessary Operation or Effect.

"In all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce." (*Mr. Justice* HARLAN.) *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 337 (1904); *U. S.* v. *Union Pac. Ry. Co.*, 226 U. S. 61, 82–85 (1912).

"Although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations.*" (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 331 (1904); *Loewe* v. *Lawlor*, 208 U. S. 274, 297 (1908); *Ware-Kramer Tobacco Co.* v. *Amer. Tobacco Co.*, 178 Fed. 117, 124 (C. C.—E. D. North Carolina, 1910); *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 741. (D. C.—N. D. Ohio, E. D. 1913.)

"The test of the legality of a contract or combination under this act is its direct and necessary effect upon competition in interstate or international commerce. If the necessary effect of a contract, combination, or conspiracy is to stifle, or directly and substantially to restrict, free competition in commerce among the states or with foreign nations, it is a contract, combination or conspiracy in restraint of that trade, and it violates the law." (SANBORN, *Circuit Judge. U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 179, see also page 188. (C. C.—E. D. Missouri, E. D. 1909.)

"If the necessary effect of a combination to engage in or conduct interstate or international commerce is but incidentally and indirectly to restrict competition therein, while the chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law." (SANBORN, *Circuit Judge.*) *Union Pacific Coal Co.* v. *U. S.*, 173 Fed. 737, 740. (C. C. A. Eighth Circuit, 1909.)

"It is settled that a combination does not violate the

federal statute merely because it may indirectly, incidentally, or remotely restrain trade or tend toward monopoly. If its necessary effect is to stifle or to directly or substantially restrict interstate commerce, it falls under the ban of the law. On the other hand, if it only incidentally or indirectly restricts competition while its main purpose and chief effect are to promote the business and increase the trade of consumers, it is not denounced or voided by that law." (KNAPPEN, *District Judge.*) *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. 704, 712. (C. C.—W. D. Michigan, N. D. 1908), citing numerous cases.

CHAPTER VIII

CONTRACTS IN RESTRAINT OF TRADE

§ 172. Restraints on General Right of Alienation.

"The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best served by great freedom of traffic in such things as pass from hand to hand." (LURTON, *Circuit Judge.*) *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 39. (C. C. A. Sixth Circuit, 1907.)

§ 173. General Right to Fix Terms of Sale.

Every person "engaged in the production of an article may, of course fix the terms upon which he will sell, provided he violates no law in so doing"; . . . "but when all, or substantially all, producers and dealers combine to fix prices and control sales as well as production, the interests of the public are at once threatened, and necessarily injured." (RAY, *District Judge.*) *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 190, 191. (D. C.—N. D. New York, 1913.)

§ 174. Preventing Play of Natural Competition.

"The natural, direct and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, re-

strains instead of promoting trade and commerce." (*Mr. Justice* PECKHAM.) *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 577 (1898).

§ 175. Where Restraint is Insignificant.

Even if a contract does not leave commerce among the states untouched, this is immaterial where the "interference with such commerce is insignificant and incidental and not the dominant purpose of the contract." (*Mr. Justice* HOLMES.) *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 184 (1906).

§ 176. Conventional Restraint of Trade must be Ancillary.

"No conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe Co.*, 85 Fed. 271, 281. (C. C. A. Sixth Circuit, 1898.)

§ 177. Promotion of Legitimate Business.

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce." (*Mr. Justice* PECKHAM.) *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 568 (1898).

"Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show

that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object." (*Mr. Justice* PECKHAM.) *Anderson* v. *U. S.*, 171 U. S. 604, 615–616 (1898).

§ 178. Sale With Covenant not to Compete.

"Agreements by the seller of property or business not to compete with the purchaser in such a way as to impair the business sold are perfectly valid," (SWAN, *District Judge.*) *A. Booth & Co.* v. *Davis*, 127 Fed. 875, 878 (C. C.—E. D. Michigan, S. D. 1904); *Davis* v. *A. Booth & Co.*, 131 Fed. 31, 38 (C. C. A. Sixth Circuit, 1904); *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 281 et seq. (C. C. A. Sixth Circuit, 1898.)

Where a business is purchased and the vendor continued in charge, a covenant binding him not to engage in the same business in the same locality in his own behalf is not forbidden by the Act. (See concurring opinion of COXE, *Circuit Judge.*) *U. S.* v. *Am. Tobacco Co.*, 164 Fed. 700, 710. (C. C.—S. D. New York, 1908.)

§ 179. Contract Restriction Must not be too Broad.

While the mere sale of a business with an accompanying agreement not to engage in a similar business is not ordinarily a restraint within the meaning of the Sherman

Act, yet where such agreement is far more extensive in its outlook and more onerous in its intention than is necessary to afford a fair protection to the vendee, the agreement is void as in restraint of trade and against public policy. *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423, 434–435 (1908).

"While it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, . . . yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. . . . Public welfare is first considered and, if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained." (*Mr. Chief Justice* FULLER.) *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 408–409.

§ 180. Restraint Must be Confined Within Proper Bounds.

"To justify restraint, reason for it must be found in the nature of the property or the situation of the parties, as, for instance, in the sale of a business or professional good will, and other similar cases. Even then the restraint must be confined within such reasonable limits as the circumstances require." (BUTLER, *District Judge.*) *National Harrow Co.* v. *Hench*, 83 Fed. 36, 38. (C. C. A. Third Circuit, 1897.)

§ 181. Mere Purchase or Sale with Incidental Restraint.

A mere lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or

manufacturer does not restrain commerce or trade within the meaning of the Act. This is true even if there is an accompanying agreement not to engage in a similar business, if such agreement is collateral to the main contract, and was entered into for the purpose of enhancing the price of sale. *U. S.* v. *Joint Traffic Asso.*, 171 U. S. 505, 567–568 (1898), cited in concurring opinion in *U. S.* v. *Am. Tobacco Co.*, 164 Fed. 700, 710. (C. C.—S. D. New York, 1908.)

§ 182. Protection of Good Will.

"The sale of a business and the surrender of the good will pertaining thereto, and an agreement thereunder, with reasonable limitations as to time and territory not to compete with the purchaser, when made as a part of a sale of a business and not as a device to control commerce, is not within the Federal Anti-Trust Law." (*Per Curiam.*) *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 742. (D. C.—N. D. Ohio, E. D. 1913); *Darius Cole Transp. Co.* v. *White Star Line*, 186 Fed. 63, 65. (C. C. A. Sixth Circuit, 1911.)

§ 183. Non-Competing Covenant when Ordinary Incident.

"A sale or license, with a covenant not to compete, made as an *ordinary incident* to enhance the value of the thing conveyed is not within the Sherman Act." (BROWN, *District Judge.*) (Italics mine.) *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 557 (C. C. Mass. 1909); *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 185 (1906); *U. S.* v. *Freight Association*, 166 U. S. 290, 329 (1897).

§ 184. Text of Contract with Covenant not to Compete.

For the text of a contract or agreement for the sale of a business and property thereof with a covenant not to com-

pete directly or indirectly with the purchaser for a period of ten years, held to be valid under the Act, see *A. Booth & Co.* v. *Davis*, 127 Fed. 875, 877–878 (C. C.—E. D. Michigan, 1904); *Davis* v. *A. Booth & Co.*, 131 Fed. 31, 32–33. (C. C. A. Sixth Circuit, 1904.)

§ 185. Contract Made by Combination in Usual Course of Business.

A contract made by a corporation in the usual course of its business is not invalidated by such corporation being a combination in restraint of trade within the prohibitions of the Act. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 550–551 (1902).

If, however, such contract goes further and is an actual instrumentality for carrying out and putting into effect the illegal combination, it is invalid because an essential part of an alleged scheme. *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 260 et seq. (1909).

§ 186. Agreements not to Bid.

"It is well settled that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 293. (C. C. A. Sixth Circuit, 1898.)

§ 187. Use of Guarded Language Covering Real Purpose.

Even where it is sought to cover up the purpose of the contract by the use of guarded language, such as the seeking to "discourage unnecessary and unreasonable competition," such language must nevertheless be taken and construed in the light of the actions of the parties,

and in view of the attendant circumstances. *Anderson* v. *Shawnee Compress Co.*, 87 Pac. 315, 317. (Oklahoma Supreme Court, 1906.)

§ 188. Restriction not to Ship out of State.

"A contract of sale by a manufacturer to jobbers of some of its own product to be shipped across state lines of the latter whereby the parties agree that the purchasers shall not sell, ship or allow any of the product thus purchased to be shipped outside of a certain state is not in restraint of trade or illegal under the Act of July 2, 1890." (*Syllabus by the Court.*) *Philips* v. *Iola Portland Cement Co.*, 125 Fed. 593. (C. C. A. Eighth Circuit, 1903.)

§ 189. Contracts Valid when Made, Continue to be Valid.

"Contracts which were valid when made continue valid and capable of enforcement, so long at least, as peace lasts between the governments of the contracting parties, notwithstanding a change in the condition of business which originally led to their creating." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 234 (1899).

§ 190. Legality Under State Law.

"That the purchase was legal in the State where made and within corporate powers conferred by state authority constitutes no defense, if it contravenes the provisions of the Anti-Trust Act." (*Mr. Justice* DAY.) *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 86 (1912).

§ 191. Where Seller no Longer Retains Interest.

There is a clear distinction between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners

and properties under one management, where each owner's interest is continued in the combination. It may be that the former case may affect interstate commerce and become injurious to the public, but if so it would seem that the law making power must supply the correction. *Davis* v. *A. Booth & Co.*, 131 Fed. 31, 37. (C. C. A. Sixth Circuit, 1904.) (*Note.* Might be unlawful however as a part of a scheme of monopoly.)

§ 192. Mere Change of Form of Investment.

"Whether a transaction amounts to a sale or to a combination depends upon whether the vendor parts with all interests in the business sold or merely changes the form of his investment. A bona fide sale of a plant for cash or its equivalent possesses none of the elements of combination. An exchange of one plant for an interest in united plants possesses all the elements of combination." (NOYES, *Circuit Judge, concurring opinion.*) *U. S.* v. *Am. Tobacco Co.*, 164 Fed. 700, 718. (C. C.—S. D. New York, 1908.) See also Act of Oct. 15, 1914 (Clayton Act), Sect. 7.

§ 193. Contract Partly Written and Partly Parol.

Where an entire contract was made in the first instance by parol, and only certain portions of it were later reduced to writing, all of said contract can be proved in order that the court from the inspection thereof in its entirety may determine its character. *McConnell* v. *Camors-McConnell Co.*, 152 Fed. 321, 330–331. (C. C. A. Fifth Circuit, 1907.)

CHAPTER IX

CONSPIRACY

§ 194. Conspiracy Defined.

What is "an unlawful conspiracy? I do not mean by this an indictable conspiracy, because that depends on the statute; but was it a conspiracy at common law? If it was, then injury inflicted would be without legal justification, and malicious. A conspiracy is a combination of two or more persons by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means." (TAFT, *Circuit Judge.*) *Thomas* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 817–818 (C. C.—S. D. Ohio, W. D. 1894); *Pettibone* v. *U. S.*, 148 U. S. 197, 203 (1892); *U. S.* v. *Debs*, 64 Fed. 724, 748 (C. C.—N. D. Illinois, 1894); *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 293. (C. C. A. Sixth Circuit, 1898.)

§ 195. Common Design is Essence of Conspiracy.

The common design is the essence of the charge and arises out of mutual understanding arrived at by whatever means. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common or unlawful design, and each one of such persons becomes a member of such conspiracy even though the part he takes is subordinate or to be executed at a remote distance.

U. S. v. *Cassidy*, 67 Fed. 698, 702. (D. C.—N. D. California, 1895.)

§ 196. Overt Act not Necessary.

It is not necessary in actions brought under the Act to allege and prove commission of an overt act as required by Section 5440 of the Revised Statutes. The offense aimed at is the mere conspiracy to restrain trade or monopolize interstate or international trade and commerce, and no more. *U. S.* v. *Kissel*, 173 Fed. 823, 825 (C. C.—S. D. New York, 1909); *U. S.* v. *Patterson*, 201 Fed. 697, 722-723 (D. C.—S. D. Ohio, W. D. 1912); *U. S.* v. *New Departure Mfg. Co.*, 204 Fed. 107, 111. (D. C.—W. D. New York, 1913.) See also Chapter herein on Indictments.

§ 197. Distinguished from Contract.

A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. While constituted by an agreement, it is the result thereof rather than the agreement itself, just as a partnership, although sounding in and arising out of contractual relations, is not the contract but is the result of it. In each case the agreement is instantaneous, but the results may continue for years. *U. S.* v. *Kissel & Harned*, 218 U. S. 601, 608 (1910).

§ 198. Continuance in Time.

"A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act." (*Mr. Justice* HOLMES.) *U. S.* v. *Kissel & Harned*, 218 U. S. 601, 608 (1910).

§ 199. A Conspiracy may have Continuance in Time. Time not Essence of Conspiracy.

"It is true that the mere continuance of the result of the crime does not continue the crime. *United States* v. *Irvine*, 98 U. S. 450. But when the plot contemplates the bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one." (*Mr. Justice* HOLMES.) *U. S.* v. *Kissel & Harned*, 218 U. S. 601, 607 (1910).

"A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success." (*Mr. Justice* HOLMES.) *U. S.* v. *Kissel & Harned*, 218 U. S. 601, 607–608 (1910).

While time is held to be the essence of conspiracy in Massachusetts, Maine and Texas, this has been thought a local peculiarity and has no application in the federal courts. *U. S.* v. *Kissel & Harned*, 218 U. S. 601, 609–610 (1910).

§ 200. Two or More Persons.

The gist of conspiracy is the unlawful agreement,—that is, that two or more persons shall form a plan for concerted action. A verdict of guilty, therefore, must necessarily be predicated upon the guilt of at least two persons. A conspiracy cannot be committed by one person alone. There

must be two wills acting in co-operation. Where the indictment charged certain defendants conspired among themselves, at least two of such defendants must be guilty although divers other persons unknown may be concerned. The verdict of guilty cannot be formed against one defendant. *U. S.* v. *American Naval Stores Co.*, 172 Fed. 455, 460. (Charge to Jury.) (C. C.—S. D. Georgia, 1909.)

§ 201. Act of One is Act of All.

"Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object is, in the contemplation of the law, the act of the whole party." (MORROW, *District Judge.*) *U. S.* v. *Cassidy*, 67 Fed. 698, 702–703. (D. C.—N. D. California, 1895.)

§ 202. Aiding in Performance.

"If a series of acts are to be performed with a view to produce a particular result, he who aids in the performance of any one of these acts, in order to bring about the result, must have the intention to effectuate the end proposed and if he operates with the others, knowing them to have the same design, there is in fact an agreement between him and them. His criminal intent is not to be distinguished from the intent of those who first formed the plans of the conspiracy." *People* v. *Mather*, 4 Wend. (N. Y.) 230, 260, cited with approval by SANBORN, *Circuit Judge*, in *U. S.* v. *Standard Oil Co. of New Jersey*, 152 Fed. 290, 295. (C. C.—E. D. Missouri, E. D. 1907.)

§ 203. Joining After Formation of Conspiracy.

Anyone who, after a conspiracy is formed, and who

knows of its existence, joins therein in promotion of the common cause, becomes as much a party thereto from that time, as if he had originally conspired. *U. S.* v. *Cassidy*, 67 Fed. 698, 702. (D. C.—N. D. California, 1895.) *U. S.* v. *Standard Oil Co. of New Jersey*, 152 Fed. 290, 294–295 (C. C.—E. D. Missouri, E. D. 1907) and cases cited; *Jayne* v. *Loder*, 149 Fed. 21, 30. (C. C. A. Third Circuit, 1906.)

§ 204. Corporation can Conspire.

A corporation can conspire; and the old notion has long since vanished, that a corporation is not responsible for doing anything which is not authorized by its charter. *U. S.* v. *MacAndrews* v. *Forbes Co.*, 149 Fed. 823, 835. (C. C.—S. D. New York, 1906.)

While, however, a corporation may conspire with other corporations and with individuals, it may not conspire with its own officers, directors or agents. *U. S.* v. *American Naval Stores Co.*, 172 Fed. 455, 463. (C. C.—S. D. Georgia, E. D. 1909.)

§ 205. Not to be Judged by Legality of Dismembered Parts.

"The character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." (*Mr. Justice* VAN DEVANTER.) *U. S.* v. *Patten*, 226 U. S. 525, 544 (1913).

§ 206. Conspirators not all Traders.

There is no need to allege and prove in support of an indictment for a conspiracy under the Sherman Act that all the conspirators were traders. *Nash* v. *U. S.*, 229 U. S. 373, 379 (1913).

§ 207. Conspiracy to Run a Corner.

A conspiracy to run a corner in the available supply of

a staple commodity, such as cotton, normally a subject of trade and commerce among the States, and thereby to enhance artificially its price throughout the country is within the terms of Sect. 1, of the Anti-Trust Act. *U. S.* v. *Patten*, 226 U. S. 525, 540–541 (1913).

"It may well be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and customers in satisfying their needs, and to produce practically the same evils as does the suppression of competition." (*Mr. Justice* VAN DEVANTER.) *U. S.* v. *Patten*, 226 U. S. 525, 542 (1913).

§ 208. Circumstantial Evidence.

Conspirators "do not advertise their purposes openly, their methods are secret, sinister and clandestine. It is rare, indeed, that a conspiracy is proved by direct evidence. In a vast majority of cases circumstantial evidence is relied on. Such evidence is as efficacious as direct if it established the proposition that the defendants, or some of them, had a common purpose to violate the law which they succeeded in accomplishing." (COXE, *Circuit Judge.*) *Hale* v. *Hatch & North Coal Co.*, 204 Fed. 433, 435. (C. C. A. Second Circuit, 1913.) *Marrash* v. *U. S.*, 168 Fed. 225, 229 (C. C. A. Second Circuit, 1909).

§ 209. Order of Proof.

The rule in the admission of evidence in conspiracy cases is to require first the proof of a prima facie case of conspiracy before the acts and declarations of co-conspirators made in the absence of the defendants are admitted against

them. The court may however exercise its discretion in permitting such evidence to be admitted out of order. *Loder* v. *Jayne*, 142 Fed. 1010, 1015–1016. (C. C.—E. D. Pennsylvania, 1906.)

CHAPTER X

COMBINATIONS

§ 210. Meaning of Combination.

"'Combination' is a word not yet possessed of an accurate legal meaning; its place in the terminology of the criminal law, I believe, is no older than this statute. Of itself it means no more than 'co-operation'—a union of effort." (HOUGH, *District Judge.*) *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 831. (C. C.—S. D. New York, 1906.)

§ 211. Combination in the Form of Trust.

"What is commonly termed a 'trust' was a species of combination organized by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles and commodities, which was well known and fully understood when the Anti-Trust Act was approved. Combinations in that form were accordingly prohibited; but Congress, evidently anticipating that a combination might be otherwise formed, was careful to declare that a combination in any other form, if in restraint of interstate commerce—that is, if it directly occasioned or effected said restraint—should likewise be deemed illegal." (THAYER, *Circuit Judge.*) *U. S.* v. *Northern Securities Co.*, 120 Fed. 721, 724. (C. C. Minnesota, 3d Dist., 1903.)

§ 212. Trust Defined.

"A more modern definition of a trust declares it to be

'any compact between two or more persons or corporations, affecting any article or commodity of which the public must have a constant supply, the intent and direct tendency of such an arrangement being the creation of a scarcity or the enhancement of the price.'" (SPEER, *District Judge.*) *In re Charge to Grand Jury*, 151 Fed. 834, 835. (D. C.—E. D. Georgia, 1907.)

§ 213. Form of Combination is Immaterial.

"It matters not whether the combination be 'in the form of a trust or otherwise,' whether it be in the form of a trade association, or a corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce, and monopolizes or attempts to monopolize a part of that commerce, in a sense that violated that Act." (LANNING, *Circuit Judge.*) *U. S.* v. *Du Pont DeNemours & Co.*, 188 Fed. 127, 151. (C. C. Delaware, 1911.)

"No weight is attached, therefore, to the means by which the combination was formed if a combination within the purview of the statute was created. That it was a combination of five companies is clear. The fact that this combination took the form of a new corporation is immaterial." (SMITH, *Circuit Judge.*) *U. S.* v. *International Harvester Co.*, 214 Fed. 987, 994. (D. C. Minnesota, 1914.)

§ 214. Two or More Persons Necessary to Create Combination.

"The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by one man alone." (SANBORN, *Circuit Judge.*)

Union Pacific Coal Co. v. *U. S.*, 173 Fed. 737, 745. (C. C. A. Eighth Circuit, 1909.)

§ 215. Later Members of Combination.

Combination means no more than co-operation, a union of effort, and it makes "no difference whether those personally assisting in or contributing to such wrongful result were original laborers in the vineyard or came in at the eleventh hour." (HOUGH, *District Judge.*) *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 831. (C. C.—S. D. New York, 1906.)

§ 216. Where Combination Antedated Corporation.

A defendant company may make itself a party to a combination in restraint of interstate commerce that antedated its organization, where it is itself the instrument of the very individuals who promoted such combination, in which case it becomes a party as soon as it comes into existence. *U. S.* v. *Northern Securities Co.*, 120 Fed. 721, 730 (C. C. Minnesota, 3d C., 1903); *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 357 (1904); *Tribolet* v. *U. S.*, 95 Pac. 85, 88. (Supreme Court Arizona, 1908.)

§ 217. Continuing Offense Under the Act.

"The condition or state of facts against which the statute is directed is a continuing condition, and therefore the offense of *creating and maintaining that condition* is necessarily a continuing offense." It requires "time for the working parts of the combination to become co-operative or for the monopoly to become more than a hope." (HOUGH, *District Judge.*) (Italics mine.) *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 830. (C. C.—S. D. New York, 1906.)

"The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future and if the agreement be continued it then becomes a violation of the act." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 342 (1897).

§ 218. Combination Wholly Within State.

"Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 247 (1899).

§ 219. Combination Formed Abroad.

The fact that a combination in restraint of trade was formed abroad is immaterial where it affects the foreign commerce of this country and is put into operation here. *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. 251, 253. (C. C. A. Second Circuit, 1908.)

"Citizens of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad or by employing foreign vessels to effect their purpose." (NOYES, *Circuit Judge.*) *U. S.* v. *Hamburg-Amer., etc., Gesellshaft,* 200 Fed. 806, 807. (C. C.—S. D. New York, 1911.)

§ 220. Combination Operating Abroad Solely.

It is sufficient to exclude an examination by any of the federal courts of the lawfulness of acts complained to be in violation of the Sherman Law that said acts were committed in territory over which a foreign state was de facto sovereign. *Am. Banana Co.* v. *United Fruit Co.,* 166 Fed. 261, 266. (C. C. A. Second Circuit, 1908.)

§ 221. Combination Operating only in Part Within United States.

Any control exercised over transportation in the United States is within the jurisdiction of its laws. While the federal courts cannot reach foreign citizens or corporations operating in foreign countries, such courts certainly may exercise control over such citizens and corporations operating within the territorial limits of the United States. *U. S.* v. *Pacific & Artic Co.,* 228 U. S. 87, 106 (1913).

§ 222. Combination Solely for Greater Efficiency.

"The combination of various elements of machinery, all relating to the same art and the same school of manufacture, for the purpose of constructing economically and systematically, and of furnishing any customers, the whole or any part of an entire system, is in strict and normal compliance with modern trade progress." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Winslow,* 195 Fed. 579, 592. (D. C. Mass. 1912.)

§ 223. Blacklisting of Competitors.

A combination of retail lumber dealers designed to prevent wholesalers from engaging in the retail trade carried on in several states, any competing wholesaler being blacklisted and reported to each retailer in pursuance of said purpose, is within the prohibition of the act, the tendency of said reports being to withhold patronage from the listed concerns. *Eastern States Retail Lumber Dealers' Assn.* v. *U. S.*, 234 U. S. 600, 605 et seq. (1914); *Lawlor* v. *Loewe*, 235 U. S. 522, 534 (1915).

§ 224. Illegal Combination Each Part of Which Taken Alone is Lawful.

While a retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, quite another case is presented when a number of retail dealers combine and agree that no one of them will trade with any producer or wholesaler within a trade range of any of them. An act although harmless when done by one alone, may become a public wrong when one of similar acts done by many in concert. *Eastern States Retail Lumber Dealers' Assn.* v. *U. S.*, 234 U. S. 600, 614 (1914).

"A series of acts each of which may be innocent in itself, may be wrongful if the direct object, purpose and result thereof be to carry into effect a combination whereby the free flow of commerce between the states . . . is obstructed." (EVANS, *District Judge.*) *Monarch Tobacco Works* v. *Am. Tobacco Co.*, 165 Fed. 774, 780. (C. C.—W. D. Kentucky, 1908.)

§ 225. Control of Resale Prices.

Manufacturing concerns are within the prohibitions of the Sherman Law when they, by means of contracts with their jobbers, or wholesale and retail dealers, control and

maintain the resale prices of their products where competition between such dealers is thereby extinguished; and this is true whether such result is accomplished by a combination of several manufacturers acting through a single selling agency, or by a single manufacturer acting directly through a system of restrictive agreements. *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 261 (1909); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 408 (1911).

Where two or more competing concerns combine and agree to fix retail prices and not to sell to any wholesaler who sells to any retailer or jobber who cuts the prices of any one of said concerns, such combination or agreement is within the prohibition of the Act. *Jayne* v. *Loder*, 149 Fed. 21, 27. (C. C. A. Third Circuit, 1906.)

§ 226. Power to Fix Prices Placed by Competitors in Single Control.

"A combination or an agreement is within the condemnation of the Act which places the power in the hands of a controlling or selling company to fix the prices to consumers and dealers of the commodity produced by those in the combination, and who had theretofore been competitors, and to sell or not to sell at all such production, and also fix or determine the class or classes of persons who shall be permitted to purchase and sell or deal in such commodity. The exercise of such a power would clearly interfere with and restrict the 'free flow of commerce.'" (RAY, *District Judge.*) *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 193. (D. C.—N. D. New York, 1913.)

§ 227. Sole Purpose to Destroy Competition and to Fix Prices.

"Agreements or combinations between dealers, having

for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void." (*Mr. Justice* HUGHES.) *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 408 (1911).

"It may be yet regarded as well settled that a combination formed for the express purpose and with the express intent of eliminating natural and existing competition in interstate commerce, and of monopolizing and restraining such interstate commerce, by the employment of unusual and abnormal methods of business, constitutes undue restraint or suppression, and so offends against the anti-trust act." (*Per Curiam.*) *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 741. (D. C.—N. D. Ohio, E. D. 1913.)

§ 228. Presumption of Illegitimate Purpose.

"There is a distinction between combination and agreements that were entered into with the legitimate purpose of reasonably forwarding personal interest and developing trade, and those that give rise to the inference or presumption they had been entered into with intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce, and tending to bring about the evils, such as the enhancement of prices which were considered to be against public policy." (RAY, *District Judge.*) *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 192 (D. C.—N. D. New York, 1913); *U. S.* v. *International Harvester Co.*, 214 Fed. 987. (D. C. Minnesota, 1914.)

§ 229. Total Suppression of Trade Unnecessary.

"It is not necessary to prove a total suppression of trade. It is only essential to show that by its necessary operation it tends to restrain interstate or international trade or tends to create a monopoly in such trade or com-

merce and to deprive the public of the advantages that flow from free competition." (COXE, *Circuit Judge*, concurring opinion.) *U. S.* v. *Am. Tobacco Co.*, 164 Fed. 700, 707. (C. C.—S. D. New York, 1908.)

"Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 245 (1899).

§ 230. Combination Need not Effect Complete Monopoly.

In order to bring a combination within the prohibitions of the statute it is not necessary to show that a complete and nation wide monopoly has actually been created, or that the entire trade or business and production of an article has been brought within the control of the combination, or ever will be. It is sufficient if it be shown that the combination effects a restraint of trade of interstate commerce to a substantial degree. *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 191. (D. C.—N. D. New York, 1913.)

§ 231. Unusual and Abnormal Methods.

It is "well settled that a combination formed for the express purpose and with the express intent of eliminating natural and existing competition in interstate commerce and of monopolizing and restraining such interstate commerce, by the employment of unusual and abnormal methods of business, constitutes undue restraint or oppression, and so offends against the anti-trust act." (*Per*

Curiam.) *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 741. (D. C.—N. D. Ohio, E. D. 1913) and cases cited.

§ 232. Innocent Purchaser of Commodity of Combination.

Where a person purchases paper in the ordinary course of business and is a stranger to an unlawful combination, his obligation to pay is not avoided by the provisions of the act where the sale has no direct relation to such combination. *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 Fed. 491, 493–494 (C. C. A. Seventh Circuit, 1906) and cases cited; *Hadley Dean P. G. Co.* v. *Highland Co.*, 143 Fed. 242, 244 (C. C. A. Eighth Circuit, 1906); *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 545 (1902).

§ 233. Sale by Combination to Party Thereto.

But where an illegal combination engaged in interstate commerce seeks to enforce a contract for the sale and purchase of goods which is based upon agreements which are essential parts of an illegal scheme to accomplish the ends for which the said combination was organized, federal courts will not lend their aid in realizing the fruits of its illegality. *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, 261–262 (1909).

§ 234. One may do what Many Cannot.

"One may do in fixing and enforcing prices, and in exacting tribute from the people and restraining interstate commerce, what two or more cannot do in pursuance of an agreement or combination." (RAY, *District Judge.*) *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 191. (C. C.—S. D. New York, 1905.)

One person may purchase all of an existing commodity and fix the price at which he will sell, but if several owners of portions of such commodity combine and fix prices,

limit interstate commerce, and drive competitors out of business, the combination thereby formed is illegal. *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 191. (C. C.—S. D. New York, 1905.)

"An act which, if done by an individual, may be lawful, may become quite a different thing when undertaken to be done by a confederation among many, having for its inspiration the purpose of injuring and destroying the property of another, by preventing him from prosecuting his business by taking into his service others to supply the places of those who voluntarily have gone out." (PHILIPS, *District Judge.*) *U. S.* v. *Elliott*, 64 Fed. 27, 32. (C. C.—E. D. Missouri, 1894.)

§ 235. Voluntary Withdrawal.

The illegality of a combination in restraint of trade is not excused because of a stipulation that each or all of the members thereof could at any time withdraw. This is merely the recital of a privilege which any party to an unlawful enterprise inherently enjoys. *Tift* v. *Southern Ry. Co.*, 138 Fed. 753, 763. (C. C.—W. D. Georgia, S. D. 1905.)

§ 236. Inability of Competitors to Supply Market no Excuse.

A combination cannot secure immunity for its acts by bringing into its fold all the manufacturers of its line of goods, and by intrenching itself behind the proposition that the resulting restraint of trade comes not from the combination, but from the inability of others to supply the market. *Ellis* v. *Inman, Poulesen & Co.*, 131 Fed. 182, 187. (C. C. A. Ninth Circuit, 1904.)

§ 237. Reduction of Prices for Time Being, no Excuse.

"In business or trading combinations, they may even temporarily, or perhaps permanently, reduce the price of

the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of said class, and the absorption of control over one commodity by an all-powerful combination of capital." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Asso.*, 166 U. S. 290, 323 (1897); *Chesapeake & O. Fuel Co.* v. *United States*, 115 Fed. 610, 623. (C. C. A. Sixth Circuit, 1902.)

"Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act." (*Mr. Justice* DAY.) *U. S.* v. *Union Pac. Ry. Co.*, 226 U. S. 61, 88 (1912).

§ 238. Improvement of Service.

"The fact that the towing and wrecking service has been improved under the Towing Company's administration cannot legalize the combination if otherwise unlawful. Not only do good motives furnish no defense to a violation of the anti-trust act (*Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20; 33 Sup. Ct. 9, 57 L. Ed. 107), but we have no right to assume that the unsatisfactory conditions existing in 1899 could not have been eliminated by lawful and normal methods." (*Per Curiam.*) *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 744. (D. C.—N. D. Ohio, E. D. 1913.)

§ 239. Protection of Parties and Reasonable Prices.

It is no defense to a combination or contract in restraint of trade to show "that even if it affected interstate commerce, the contract or combination was only a reasonable restraint upon a ruinous competition, among themselves, and was formed only for the purpose of protecting the parties thereto in securing prices for their product that were fair and reasonable to themselves and the public." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 235 (1899).

"It has been earnestly pressed upon us that the prices at which the cast-iron was sold in 'pay' territory were reasonable. A great many affidavits of purchasers of pipe in 'pay' territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that in their opinion the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, and they chose to do so." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 293 (C. C. A. Sixth Circuit, 1898); *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 237–238 (1899).

§ 240. Continued Purchases by Public at Enhanced Price no Excuse.

"We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such

contract or combination amounts to a restraint of trade in the commodity even though contracts to buy such commodity at the enhanced price are continually being made." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 244 (1899).

§ 241. Live Stock Exchange.

Persons who are engaged in the common business as yard traders buying cattle at the Kansas City stock yards, which come from different states, may agree among themselves that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, nor buy cattle from those who also sell to yard traders who are not members of the association, where such association does no business itself, is open to all traders upon the same conditions, and its members are permitted to compete among themselves and with those who are not members. There is no feature of monopoly in the whole transaction. *Anderson* v. *U. S.*, 171 U. S. 604, 613–614 (1898).

§ 242. Increase of Profits and Prevention of Competition.

"It was not doubted, nor, indeed, can it be, that where the direct purpose of the contract in suit is to establish, for increasing their profits, a combination among manufacturers and tradesmen whose function is to prevent competition, and thereby prevent the public from obtaining those articles which are in general use, at the prices at which they could be obtained as the result of fair and untrammeled competition, such contract is unlawful, and cannot be enforced." (SEVERENS, *District Judge.*) *Cravens* v. *Carter-Crume Co.*, 92 Fed. 479, 486. (C. C. A. Sixth Circuit, 1899.)

§ 243. Hardship Resulting from Natural Industrial Changes.

"In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress, and perhaps, ruin shall be its accompaniment in regard to some of those who were engaged in the old methods. A change from stage coaches and canal boats to railroads threw at once a large number of men out of employment; changes from hand labor to that of machinery, and from operating machinery by hand to the application of steam for such purpose, leave behind them for the time a number of men who must seek other avenues of livelihood. These are misfortunes which seem to be the necessary accompaniment of all great industrial changes." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 323 (1897).

§ 244. But such Changes must not be Brought About Artificially.

"It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein." (*Mr. Justice*

PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 323-324 (1897).

§ 245. Effect of Fixing Prices.

"Where a price is fixed arbitrarily for which a manufactured article may be sold, it necessarily limits the production of that article to the amount that can be sold for that price. An increased price put upon an article restricts its sale, and the restricted sale necessarily reduces the production. It is no answer to say: 'We do not restrict your production. You may produce any amount you like. We only restrain your sale of it.' Is this not practically a limit to production? Where a pool or combination reserves the right to regulate prices, they can, by the manipulation of prices, drive their competitors out of business, create a monopoly, and enhance at their pleasure the prices to consumers." *Nester* v. *Brewing Co.*, 161 Pa. St. 473, quoted by MORROW, *Circuit Judge*, in *U. S.* v. *Coal Dealers' Assn.*, 85 Fed. 252, 264. (C. C.—N. D. California, 1898.)

§ 246. Manufacturers' Agreement to Fix Price and not to Sell to Purchasers of Competitors.

Where defendants are alleged to be manufacturers of watch cases and to have entered into an agreement to maintain an arbitrary fixed price for their goods, and not to sell any of such goods to any person or concern, whatsoever, who should thereafter buy or sell any goods manufactured by the plaintiff, such agreement does not constitute a combination to monopolize, particularly where it does not appear that either the plaintiff or defendants were engaged in interstate trade or commerce, or that the defendants absorbed or intended to absorb the interstate trade in said watch cases. *Dueber Watch Case Mfg. Co.* v.

Howard Watch Co., 55 Fed. 851, 853–854. (C. C.—S. D. New York, 1893.)

§ 247. Private Manufacturers.

"Combinations even among *private* manufacturers or dealers whereby *interstate* or *international* commerce is restrained are equally embraced by the act." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 331 (1904).

§ 248. Where Part of Combination are Manufacturers only.

Where complaint is made against a combination as a whole which monopolizes or restrains any part of interstate or foreign commerce, it is immaterial that there are members of such combination which are manufacturing companies merely. (Condensed from Concurring Opinion of *Judge* COXE.) *U. S.* v. *Am. Tobacco Co.*, 164 Fed. 700, 705. (C. C.—S. D. New York, 1908.)

§ 249. Mere Control by Stock Ownership.

The direct, immediate, and necessary effect of a control by a corporation over a competitor by stock ownership is not taken alone a restraint of trade or a monopoly forbidden by the Sherman Law. *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. 704, 715. (C. C.—W. D. Michigan, N. D. 1908.)

"We are unable to conclude upon this record that mere stock control of such a company by another in the same state either directly or necessarily destroys competition there, or if it did, that it results in any such monopoly as to directly or necessarily and immediately affect commerce among the states." (LURTON, *Circuit Judge.*) *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. 721, 727. (C. C. A. Sixth Circuit, 1909.)

Where, however, the effect of such acquisitions is "to substantially lessen competition" or "to tend to create a monopoly," they are now expressly forbidden in Section 7 of the Clayton Act (Act of October 15, 1914).

§ 250. Control of Stock Resulting in Direct Restraint.

"The exchange of the stock or shares in the ownership of competitive corporations engaged in interstate or international commerce for stock or shares in the ownership of a single corporation, the necessary effect of which is a direct and substantial restriction of competition in that commerce, constitutes a combination in restraint of commerce among the states or with foreign nations that is declared illegal by this (the Sherman) Law." (SANBORN, *Circuit Judge.*) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 179 (C. C.—E. D. Missouri, E. D. 1909); *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 354, 366 (1904); *U. S.* v. *American Tobacco Co.*, 164 Fed. 700, 718 (Concurring Opinion). (C. C.—S. D. New York, 1908.)

It makes no difference that instead of resorting to a holding company, as was done in the *Northern Securities Case*, the controlling interest in the stock of one corporation is transferred to another. Domination and control and power to suppress competition are acquired in either case. *U. S.* v. *Union Pac. R. R. Co.*, 226 U. S. 61, 85 (1912).

§ 251. Holding Company.

A holding company organized and utilized as an instrumentality for the purpose of acquiring a majority stock interest in each of two competing railroad companies engaged in interstate commerce and of eliminating all such competition, is necessarily a combination which fully dominates the situation and under which competition between the constituent companies would cease, and is a "trust"

or combination within the meaning of the Act. *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 326, 327 (1904).

§ 252. Dominating Control Extinguishing Competition.

"A combination which places the direct instrumentalities of interstate commerce in such a relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act." (*Per Curiam.*) *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 741–742. (D. C.—N. D. Ohio, E. D. 1913.)

§ 253. Dominating Though not Majority Stock Interest.

Where it appears that a holding of stock is ample enough to dominate a corporation and in fact to control its affairs, the fact that such holding does not constitute a majority of the entire stock will not save such domination from the prohibitions of the Act. *U. S.* v. *Union Pac. R. R. Co.*, 226 U. S. 61, 95–96 (1912).

§ 254. Official Proclamations and Newspaper Reports.

Where in a bill in equity brought by the government it was alleged that the flow of commerce through the City of New Orleans was purposely arrested, exhibits in the case consisting of proclamations by the Governor of Louisiana and the Mayor of New Orleans, taken from the official journals, manifestoes, and recitals of the undisproved sayings of the defendants taken from the newspapers, were introduced to show as matter of history, the vast proportions of the interruption caused by the defendants to the prosecution of all branches of business within said city, and the purpose with which it was done. *U. S.* v. *Workingmen's Amalg. Council*, 54 Fed. 994, 996–997. (C. C.—E. D. Louisiana, 1893.)

CHAPTER XI

MONOPOLY AND ATTEMPTED MONOPOLY UNDER THE ACT

§ 255. Modern Doctrine of Monopoly.

While at ancient common law the idea of monopoly was confined to the grant of an exclusive privilege, it is now understood to go much further and to include a condition produced by the acts of an individual or individuals. The dominant element of monopoly at the present time is the excluding of others or concentration into a single person or persons acting in concert; in other words the suppression of competition by an active unification of interest or management or by agreement and concert of action. *Nat'l Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129 (1905).

"The modern doctrine concerning monopoly is but a recognition of the obvious truth that what a government should not grant, because injurious to the public welfare, the individual should not be allowed to secure and hold by wrongful means. The baneful effect is the same, whether the monopoly comes as a gift from a government or is the result of individual wrongdoing." (SANBORN, *Circuit Judge.*) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 196. (C. C.—E. D. Missouri, 1909.)

§ 256. Scope of " Monopolize " or " Attempt to Monopolize."

In view of the fact that there are included in the first section only those methods of restraining trade and commerce which were recognized to be illegal under the exist-

ing state of common law at the passage of the Act, it is undoubted that such methods as well as other ways and means by which an undue restraint is arrived at are comprehended by "monopolize" and "attempts to monopolize," which are construed by the Supreme Court to include every act bringing about the prohibited results whether included within the first section or not. It follows, therefore, that the second section is broader than the first, and comprehends undue restraints of trade outside of those held to be illegal at common law, such as methods employed by an individual or corporation acting singly to exclude competitors, without contracting, conspiring or combining with anyone else, or attempts to monopolize not necessarily involving any of the offenses of the first section. See *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 61–62 (1911).

§ 257. Monopoly and Attempt to Monopolize.

"A 'Monopoly' both at common law and under this statute, implies, I think, the control of goods or service which the public desires to obtain. An attempt to monopolize means an attempt to get control of the industry in which the defendant is engaged 'by means which prevent other men from engaging in fair competition with him." *Re Greene* (C. C.), 52 Fed. 116; Joyce on Monopolies, Sects. 65–69. There may be, I think, an unreasonable restraint of trade which does not constitute a monopoly; though there can be no monopoly which does not constitute an unreasonable restraint of trade." (MORTON, *District Judge.*) *U. S.* v. *Whiting*, 212 Fed. 466, 478. (D. C. Mass. 1914.)

§ 258. Creation of Monopoly.

"A monopoly in the modern sense is created, when as a

result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition." (NOYES, *Circuit Judge*, Concurring Opinion.) *U. S.* v. *Am. Tobacco Co.*, 164 Fed. 700, 721, citing numerous cases. (C. C.—S. D. New York, 1908.)

§ 259. Attempt to Monopolize Defined.

"An 'attempt to monopolize' any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such part of trade or commerce by means which prevent or restrain others from engaging therein." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 116. (C. C.—S. D. Ohio, W. D. 1892.)

§ 260. Exclusion of Others from Competition.

According to Mr. Walker, there should be included in the meaning of monopoly, prohibited by the Sherman Law, the idea of the exclusion of others from the field of competition by the monopolist while acquiring his monopoly. *Walker: Hist. Sherman Law*, p. 297.

"A 'monopoly,' in the prohibited sense, involves the element of an exclusive privilege or grant which restrained others from the exercise of a right or liberty which they had before the monopoly was secured." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 115. (C. C.—S. D. Ohio, W. D. 1892.)

§ 261. Two Leading Elements.

In "monopoly" is embraced "two leading elements, viz., an exclusive right or privilege on the one side, and a restriction or restraint on the other, which will operate

to prevent the exercise of a right or liberty open to the public before the monopoly was secured." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 116. (C. C.—S. D. Ohio, W. D. 1892.)

§ 262. Aggregation or Concentration to the Exclusion of Others.

"In construing the federal and state statutes, we exclude from consideration all monopolies which exist by legislative grant; for we think the word 'monopolize' cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the lawmaker has used the word to mean 'to aggregate' or 'concentrate' in the hands of few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word 'pooling' which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. The expression in each law, 'combination in the form of trust' would seem to point to just what, in popular language, is meant by pooling." (*Per Curiam.*) *American Biscuit and Manfg. Co.* v. *Klotz*, 44 Fed. 721, 724–725. (C. C.—E. D. Louisiana, 1891.)

§ 263. Monopoly of "Any Part."

The words "any part" have both a geographical and distributive significance, *first*, any portion of the United States; and, *second*, any one of the classes of things forming a part of interstate or foreign commerce. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 61 (1911).

§ 264. Monopoly in Any Form.

"That the original design to suppress trusts and monop-

olies created by contract or combination in the form of trust, which of course would be of a 'contractual character' was adhered to, is clear; but it is equally clear that a further and more comprehensive purpose came to be entertained, and was embodied in the final form of the enactment. Combinations are condemned, not only when they take the form of trusts, but in whatever form found, if they be in restraint of trade. That is the effect of the words 'or otherwise.'" (WOODS, *Circuit Judge.*) *U. S.* v. *Debs*, 64 Fed. 724, 747. (C. C.—N. D. Illinois, 1894.)

§ 265. Monopoly by Any Person.

The monopolization or attempt to monopolize which is prohibited by Section 2 of the Sherman Law, can be committed by one person or corporation alone or by any number of persons; whereas a combination or conspiracy to violate the Sherman Law cannot be made by one person only. *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 826. (C. C.—S. D. New York, 1906.)

"One person or corporation may offend against the second section by monopolizing, but the first section contemplates conduct of two or more. A cursory reading of the act shows this. That it was the intention of Congress to condemn monopolies, not based on illegal combinations among several, but secured by single persons, natural or artificial, by other means, also appears from the history of the legislation." (HOOK, *Circuit Judge,* Concurring Opinion.) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 195. (C. C.—E. D. Missouri, 1909.)

§ 266. Welding Together of Competing Corporations.

"But whatever may be the precise definition of the word monopoly as used in this statute, a business device by which a considerable number of the competing corpora-

tions are welded into a single corporate entity which controls from 90 to 95 per cent of the commerce of the country in a particular branch required for the economical production of a necessity of mankind is a monopoly." (RUGG, *Chief Justice.*) *United Shoe Machinery Co.* v. *La Chapelle*, 212 Mass. 467, 480. (Supreme Court, Massachusetts, 1912.)

§ 267. All Unlawful Attempts to Restrain Trade are Embraced.

The second section seeks to make the prohibitions of the Act more complete by embracing all attempts to restrain trade by any attempt to monopolize or monopolization thereof. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 61 (1911).

§ 268. Distinction Between Attempt and Preparation.

"Not every act that may be done with intent to produce an unlawful result is unlawful or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law." (*Mr. Justice* HOLMES.) *Swift & Co.* v. *U. S.*, 196 U. S. 375, 402 (1905).

§ 269. Direct or Indirect Effect.

"An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the States, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, is not illegal under the second section because such attempts are indispensable to the ex-

istence of any competition in commerce among the States." (SANBORN, *Circuit Judge.*) *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 463. (C. C. A. Eighth Circuit.)

§ 270. Not Restricted to Necessaries of Life.

The application of the Act is not limited to monopolies or restraints of trade in the necessaries of life, but includes all articles used in interstate or foreign trade or commerce whether necessaries of life or not. *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 12 (1895).

§ 271. Rule of Reason.

"The criteria for ascertaining whether violations of the second section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the provisions of the act." (*Mr. Chief Justice* WHITE.) *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 62 (1911).

§ 272. Magnitude of Business.

"Magnitude of business does not, alone, constitute monopoly, nor effort at magnitude an attempt to monopolize. To offend the act the monopoly must have been secured by methods contrary to the public policy as expressed in the statutes or in the common law." (SANBORN, *Circuit Judge.*) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 195 (C. C.—E. D. Missouri, 1909); *U. S.* v. *Am. Naval Stores Co.*, 172 Fed. 455, 458, 459. (C. C.—S. D. Georgia, E. D. 1909.)

§ 273. Monopoly Need not be Complete.

There need not be a total suppression of trade or a complete monopoly; it is enough if the necessary operation of the scheme tends to restrain interstate commerce, and to deprive the public of the advantage flowing from free competition. *Northern Securities Co.* v. *U. S.*, 193 U. S.

197, 332 (1904); *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 16 (1895); *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 833 (C. C.—S. D. New York, 1906); *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. 704, 716 (C. C.—W. D. Michigan, N. D. 1908); *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 743. (D. C.—N. D. Ohio, E. D. 1913.)

"The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but seeks to reach those which directly restrain or impair the freedom of interstate trade. The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge 'trusts' which shall control the production and sale of a commodity." (DAY, *Circuit Judge.*) *Chesapeake & O. Fuel Co.* v. *U. S.*, 115 Fed. 610, 624. (C. C. A. Sixth Circuit, 1902.)

§ 274. Necessary Tendency is Sufficient.

"To vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 332 (1904); *Chesapeake & O. Fuel Co.* v. *U. S.*, 115 Fed. 610, 623 (C. C. A. Sixth Circuit, 1902); *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 192. (C. C.—S. D. New York, 1905.)

§ 275. No Defense that Trade is Uninjured.

"The attempt to confer power to regulate and restrain

interstate commerce by contract is a usurpation of the functions of congress, and cannot be sustained upon the ground that trade has not in fact been injured." (THOMPSON, *District Judge.*) *U. S.* v. *Chesapeake & O. Fuel Co.*, 105 Fed. 93, 104. (C. C.—S. D. Ohio, W. D. 1900.)

§ 276. Acquirement of Potential Power.

"Trade and commerce are 'monopolized' within the meaning of the act, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of commodity moving in interstate commerce. It is not necessary that the power thus obtained be exercised. Its existence is sufficient." (NOYES, *Circuit Judge.*) *U. S.* v. *Patten*, 187 Fed. 664, 672. (C. C.—S. D. New York, 1911).

"It must be noted that the authorities hold that the material consideration, in determining whether a monopoly exists, is not that prices are raised and that competition is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so. The validity of an organization according to the authorities 'is not to be tested by what has been done under it, but by what may be done under it; not by its performance, but by its power of performance when fully exercised.'" (NOYES, *Circuit Judge*, Concurring Opinion.) *U. S.* v. *Am. Tobacco Co.*, 164 Fed. 700, 721. (C. C.—S. D. New York, 1908) citing numerous cases.

§ 277. Plan of Monopoly may make Parts Unlawful.

"No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is

sufficient to prevent the punishment of the plot by law." (*Mr. Justice* HOLMES.) *Aikens* v. *Wisconsin*, 195 U. S. 194, 205 (1905); *Swift* v. *U. S.*, 196 U. S. 275, 296 (1905); *Loewe* v. *Lawlor*, 208 U. S. 274, 299 (1908).

§ 278. Manufacturing Monopoly Within a State.

Manufacturing within a State of an article is not within the purview of the act, although the manufacturing combination constitutes a monopoly. It makes no difference that the manufacturer intends his product for sale in other states and foreign countries. "The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce." (*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 13 (1895); *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 238, 247 (1899); *Robinson* v. *Suburban Brick Co.*, 127 Fed. 804, 807. (C. C. A. Fourth Circuit, 1904.)

"It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with." (*Mr. Chief Justice* FULLER.) *U. S.* v. *E. C. Knight Company*, 156 U. S. 1, 11 (1895).

An attempt to monopolize, or the actual monopoly of

the *manufacture* of an article, is not in and of itself an attempt to monopolize interstate commerce, even though, in order to dispose of the product, the instrumentality of commerce is necessarily invoked. *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 17 (1895).

§ 279. Power of State Legislature.

"The power of the Legislature to decide what monopolies in trade should be forbidden as injurious to the general welfare rests upon the same foundation, and (unless limited by some provision in the national Constitution) may be exercised as fully and freely, as its power to legislate for the protection of the public health or the public morals." *Opinion of Justices of Massachusetts Supreme Court regarding the proposed Machinery Bill of 1907.* Volume 193 Mass. 605, 610.

§ 280. Predictions of Ruin.

"It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 351 (1904).

§ 281. Natural Effect of Competition.

"The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce." (*Mr. Justice* HARLAN.) *No. Securities Co.* v. *U. S.*, 193 U. S. 197, 331 (1904).

"While absolutely free competition may have in some instances and for a time resulted in injury to some of the railroads, it is not at all clear that the general result has been other than beneficial to the whole public, and not in

the long run detrimental to the prosperity of the roads." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 338 (1897).

§ 282. Normal Competition the Law of Trade.

"Whatever may be the views of individual economists, under the Federal statutory policy normal and healthy competition is the law of trade; and such evils as may result from such competition must be considered less than those liable to follow a complete unification of interests and the power such unification gives." (*Per Curiam.*) *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 744. (D. C.—N. D. Ohio, E. D. 1913.)

"Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker. Fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world." (SHIRAS, *District Judge*, Dissenting Opinion.) *U. S.* v. *Trans-Missouri Freight Assn.*, 58 Fed. 58, 94 (C. C. A. Eighth Circuit, 1893); *U. S.* v. *Freight Assn.*, 166 U. S. 290, 337 (1897). (Note. Mr. Justice Peckham in latter case quotes language of Judge Shiras with approval in reversing former case.)

"Competition not combination should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest, and the power such unification gives." (*Mr. Justice* MCKENNA.) *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129 (1905), and cases cited. *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 84 (1912).

"Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." (*Mr. Justice* HARLAN.) *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 337; *U. S.* v. *Union Pacific Ry. Co.*, 226 U. S. 61, 83 (1912).

§ 283. That Monopoly is Beneficial to Public is no Excuse.

"But the policy of the law looks to competition, as the best and safest method of securing these benefits, and not to combinations which restrain trade. It is opposed to the methods of combinations, and will not suffer competition to be destroyed under the pretense that the public will be better served by combination. In the exercise of the power of regulation conferred upon it by the constitution, congress has chosen competition, in preference to combination, as the best factor for the maintenance of the life and the promotion of the ends of interstate commerce." (THOMPSON, *District Judge.*) *U. S.* v. *Chesapeake & O. Fuel Co.*, 105 Fed. 93, 103. (C. C.—S. D. Ohio, W. D. 1900.)

§ 284. Balancing of Evils or Benefits of Monopoly and Competition.

"The legality or illegality of a combination is not to be determined by weighing or balancing the benefits to the combining parties as against the injury to public or public interests, or by weighing and balancing the possible benefits to the public interests as against the injury to such interests." (RAY, *District Judge.*) *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 190. (D. C.—N. D. New York, 1913.)

The true inquiry is, does the combination "tend directly and appreciably to restrain interstate commerce. It is

not material to ascertain just what proportion the resulting restraint of interstate commerce bears to other effects or results of the combination." (GILBERT, *Circuit Judge.*) *Ellis* v. *Inman, Poulsen & Co.*, 131 Fed. 182, 186. (C. C. A. Ninth Circuit, 1904.)

§ 285. Fixing of Reasonable Prices.

The illegality of a combination is not excused or relieved by the fact that it was induced by keen competition or unprofitable business conditions or by the fact that the prices fixed by the combination may have been reasonable. *Gibbs* v. *M'Neeley*, 118 Fed. 120, 122–123 (C. C. A. Ninth Circuit, 1902), and cases cited.

§ 286. Suppression of Unreasonable Competition.

It cannot be claimed that the suppression of unreasonable competition sanctifies an agreement or combination in restraint of trade; the common law rules against restraint of trade are founded upon the theory that competition is desirable. *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 44. (C. C. A. Sixth Circuit, 1907.)

§ 287. Scheme of Monopoly.

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give the scheme a body, and for all that we can say to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful." (*Mr. Justice* HOLMES.) *Swift* v. *U. S.*, 196 U. S. 375, 396 (1905);

Chattanooga Foundry Co. v. *Atlanta*, 203 U. S. 390, 397 (1906); *Loewe* v. *Lawlor*, 208 U. S. 274, 298–299 (1908); *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 265 (1909); *Ware-Kramer Tobacco Co.* v. *American Tobacco Co.*, 180 Fed. 160, 163, 170. (C. C.—E. D. North Carolina, R. D. 1912.)

§ 288. Vastness of Scheme.

Where a scheme of monopoly is so vast that it is inherently impossible to set forth the facts with definiteness and precision, considerable liberality is allowed, and if the allegations are enough to give the scheme a body and to result in its accomplishment, this is sufficient. *Swift & Co.* v. *U. S.*, 196 U. S. 375, 395–396 (1905.)

§ 289. Part of Unlawful Plan.

"In recent years, even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 291. (C. C. A. Sixth Circuit, 1898), and cases cited.

"It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot (*Aikens* v. *Wisconsin*, 195 U. S. 194, 206). But a series of such contracts, if the result of a concerted plan or plot between the defendants, to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that

of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful." (*Mr. Justice* LURTON.) *U. S.* v. *Reading Co.*, 226 U. S. 324, 357–358 (1912).

§ 290. Even Competitive Practices may Become Abnormal and Unlawful.

"Even competitive practices, of a nature which as between business rivals standing practically upon equal terms may be normal and lawful, yet when employed by a powerful monopolistic combination with the ability to crush, and for the purpose of crushing, a weak rival, may become abnormal and unlawful." (*Per Curiam.*) *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 744. (D. C.—N. D. Ohio, E. D. 1913.)

§ 291. Lease in Pursuance of Monopoly.

A lease made in pursuance of a scheme of monopoly which conveys all of the property of the lessor used in his business together with a covenant that he will not engage in a similar business within fifty miles of any plant operated by the lessee, and will assist in discouraging unreasonable and unnecessary competition is void as in restraint of trade under both the Sherman Law and the common law. *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423, 431 et seq. (1908).

§ 292. Monopoly by Lessors or Vendors.

"In *United States* v. *Trans-Missouri Freight Ass'n* and in *United States* v. *Joint Traffic Ass'n*, supra, is found language sustaining the inference that a lease and sale stand upon the same basis. It must be conceded that there is no necessary difference between rules pertaining to sales and leases. It seems obvious, however, that a

lessor may have a greater interest in creating and maintaining a monopoly than a vendor from the fact that on the termination of the lease the lessor, as the owner of boats suitable for the traffic in question, would be interested in the existence of as little competition as possible." (KNAPPEN, *Circuit Judge.*) *Darius Cole Transp. Co.* v. *White Star Line*, 186 Fed. 63, 67. (C. C. A. Sixth Circuit, 1911.)

§ 293. Scheme of Monopoly by Uniform Contracts.

It is well settled that a monopoly forbidden by the act may be accomplished through a system of uniform contracts or restrictive agreements devised as part of an illegal scheme to control prices and to extinguish competition. *U. S.* v. *Reading Co.*, 226 U. S. 324 (1912); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 273 (1910); *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227 (1909); *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24 (C. C. A. Sixth Circuit, 1907). For a system of uniform rebate vouchers, see *Dennehy* v. *M'Nulta*, 86 Fed. 825. (C. C. A. Seventh Circuit, 1898.) For a system of uniform lease contracts, see *Cravens* v. *Carter-Crume Co.*, 92 Fed. 479. (C. C. A. Sixth Circuit, 1899.)

§ 294. Effect of such Contracts.

"Contracts of competitors in the production or sale of merchantable commodities to deprive each competitor of the right to fix the prices of his own goods, the terms of the sale, the customers to whom he shall dispose of them and either to fix these prices, terms, and customers by the agreement of the competitors, or to entrust the power to dictate them to the same man or body of men—necessarily have the effect either to stifle competition entirely

or to directly and substantially restrict it, because such contracts deprive their rivals in trade of their best means of instituting and maintaining competition between themselves." (SANBORN, *Circuit Judge.*) *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 459–460 (C. C. A. Eighth Circuit, 1903), and cases cited.

"The provision of the contract here sought to be enforced is that for ten years after its termination every invention shall be assigned to the plaintiff savors of restraint of trade. It projects itself so far beyond the period of actual employment and payment of wages, that it appears plainly to be in aid of the unlawful combination. It would choke the inventive capacity of the defendant for a period so long after his employment ceased that his usefulness to himself or any competitor would be extinguished in most instances. When this contract is multiplied by substantially all like inventors in the country, its character as aiding the combination is too clear to require further discussion. A single contract for the employment in labor of one person is far away from interstate commerce. But when it is alleged that it is one among others with ninety-five per cent of all those skilled in a particular manufacture, and that that kind of manufacture is controlled by a combination formed of many previously competing persons which monopolizes all or substantially all interstate commerce of that kind, the single contract for labor loses its individual aspect in the larger relation it bears to the monopoly in interstate commerce. *As a single incident it may be harmless. As an integral part of an unlawful scheme for monopolizing commerce between the States which cannot be perpetuated successfully without contracts of a similar tenor with all practising a like craft, it partakes of the illegality of the scheme.*" (RUGG, *Chief Justice.*) (Italics mine.) *United Shoe Machinery Co.* v.

La Chapelle, 212 Mass. 467, 485–486. (Massachusetts Supreme Court, 1912.)

§ 295. Illegal Contract System of Contracts Separately Lawful.

Where the purpose of a combination was the prevention or destruction of competition, and agreements are entered into exactly adapted for this purpose, the plan makes the parts unlawful whatever may be said of the reasonableness or unreasonableness of each or any of the several parts. *U. S.* v. *Pacific & Artic Co.*, 228 U. S. 87, 104–105 (1913).

"In the first place, we are to consider that we are not here dealing with a single contract. The complainant has made a number of them in identical terms. . . . The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might in no way affect the public interest, when a large number might. . . . The general purpose of each separate contract is the regulation of the prices and sales of the line of preparations made by complainant. A common purpose unites each covenantee to every other and the 'system' is to be construed as 'one piece,' in which the complainant and every assenting dealer, whether wholesaler or retailer, is a party, and the agreement of each such covenantee to sell only at the prices dictated by the manufacturer constitutes one general scheme." (LURTON, *Circuit Judge.*) *John D. Park & Sons* v. *Hartman*, 153 Fed. 24, 41. (C. C. A. Sixth Circuit, 1907.)

§ 296. Evil of Unification.

"The evil of unification lies in the temptation to higher rates and lessened regard for the public interests; and the

tendency to this evil result must be recognized, even though not in a given case yet realized in actual experience." (*Per Curiam.*) *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 744. (D. C.—N. D. Ohio, E. D. 1913.)

§ 297. Sole Object to Effect Monopoly.

"Where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282–283. (C. C. A. Sixth Circuit, 1898.)

§ 298. Promise of Rebate for Exclusive Trading.

It was early held that "the promise of a rebate, as an inducement for exclusive trading, certainly does not constitute an 'attempt to monopolize' when the purchaser is left at liberty to buy where he pleases, and when all other sellers of the article are left unrestrained in offering the same, or greater, inducements." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 117. (C. C.—S. D. Ohio, W. D. 1892.)

Where, however, the giving of such rebates is a general practice carried out by means of rebate certificates of a uniform character, in pursuance of a purpose to monopolize the trade by securing the exclusive patronage of each purchaser, such rebates are unlawful and no cause of action can be predicated upon any of said rebate certificates. *Dennehy* v. *M'Nulta*, 86 Fed. 825, 858 et seq. (C. C. A. Seventh Circuit, 1898.) See also to the same general effect, *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. 251, 253. (C. C. A. Second Circuit, 1908.)

§ 299. Contracts for Imparting Confidential Communications.

Contracts merely for the confidential communication of collected facts which limit the further divulgence of such facts to other persons is not a monopoly or restraint of trade either under the statute or at common law. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 252 (1905).

CHAPTER XII

INTENT

§ 300. General Allegation.

Where allegations of intent are necessary in charging conspiracy to monopolize interstate trade, a "general allegation of intent colors and applies to all the specific charges" set forth in connection therewith and is all that is required. *Swift & Co.* v. *U. S.*, 196 U. S. 375, 395 (1905).

§ 301. Guilty Knowledge.

"In cases of conspiracy it is sufficient if a state of facts be shown from which the jury are justified in drawing the conclusion that the defendants must have known of the conspiracy." (COXE, *Circuit Judge.*) *Lawlor* v. *Loewe*, 209 Fed. 721, 727. (C. C. A. Second Circuit, 1913.)

§ 302. When Intent is Essential.

Intent is almost essential to a combination in restraint of trade and is essential to an attempt to monopolize. Where the monopoly is not actually accomplished and requires "further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen." (*Mr. Justice* HOLMES.) *Swift & Co.* v. *U. S.*, 196 U. S. 375, 396 (1905).

§ 303. Where There is only a Probability.

"Of course, if the necessary result is materially to re-

strain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences, may become important. *U. S.* v. *St. Louis Term. Assoc.*, 224 U. S. 383, 394; *Swift & Co.* v. *U. S.*, 196 U. S. 375." (*Mr. Justice* LURTON.) *U. S.* v. *Reading Co.*, 226 U. S. 324, 370 (1912).

"It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the act of Congress, . . . will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted." (*Mr. Justice* LURTON.) *U. S.* v. *St. Louis Terminal*, 224 U. S. 383, 394–395 (1912).

§ 304. Coexistence of Intent and Dangerous Probability.

Where the intent and the consequent dangerous probability exist, the Sherman Anti-Trust Act, "like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." (*Mr. Justice* HOLMES.) *Swift & Co.* v. *U. S.*, 196 U. S. 375, 396 (1895).

Accordingly where acts are done with an unlawful intent and an unlawful combination results, the offense is committed, even though the acts done were in themselves perfectly innocent and lawful. *Swift & Co.* v. *U. S.*, 169 U. S. 375, 396 (1895).

§ 305. Doubtful Cases.

"Where a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used." (*Mr. Justice* LURTON.) *U. S.* v. *Reading Co.*, 226 U. S. 324, 370 (1912).

§ 306. When Purpose or Motive is Immaterial.

"Purpose or motive is of no moment provided the contract or agreement directly provided for the suppression of competition, or when such a result as a matter of law must necessarily occur." (LURTON, *Circuit Judge.*) *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. 721, 728 (C. C. A. Sixth Circuit, 1909), and cases cited.

It is immaterial in determining the legality of a contract in restraint of trade, "whether or not it was entered into with any evil intent, but the material consideration is its injurious tendency, and the power thereby given to control prices." (PANCOAST, *Judge.*) *Anderson* v. *Shawnee Compress Co.*, 87 Pac. 315, 317. (Oklahoma, Supreme Court, 1906.)

"If the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the Government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 341 (1897).

§ 307. Intent not Necessary Where Restraint or Monopoly is the Necessary Result.

"It is not necessary to a violation of the act to show affirmatively a specific intent to restrain commerce or create a monopoly, provided that such restraint or monopoly be the direct, immediate, and necessary result of the combination." (KNAPPEN, *District Judge.*) *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. 704, 709 (C. C.—W. D. Michigan, N. D. 1908), and cases cited.

"For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 342 (1897).

"Where the contract affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce is of no importance." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 234 (1899).

"If the necessary, direct and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case, the design does not constitute the material

thing. The fact of a direct and substantial regulation is the important part of the contract, and that regulation existing, it is unimportant that it was not designed." (*Mr. Justice* PECKHAM.) *U. S.* v. *Addyston Pipe & Steel Co.*, 175 U. S. 211, 234 (1899).

"It is useless for the defendants to say they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement." (*Mr. Justice* PECKHAM.) *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 243 (1899).

Where a combination of independent competitors is such that its operation and execution will result in limiting the supply controlling the price and destroying competition in an article of interstate commerce, the parties to such combination will become violators of the Act regardless of intent. *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 191. (D. C.—N. D. New York, 1913.)

"That there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of the Supreme Court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 243; *U. S.* v. *Reading Co.*, 226 U. S. 324, 370." (*Mr. Justice* VAN DEVANTER.) *U. S.* v. *Patten*, 226 U. S. 525, 543 (1913).

§ 308. Where Result is Inconceivable.

But where it is inconceivable that contemplated acts either taken alone or collectively could produce an undue restraint or a monopoly forbidden by the Act, no allegations of intent can convert the proposed conduct into such a crime. *Nash* v. *U. S.*, 229 U. S. 373, 378 (1913); *U. S.* v. *Winslow*, 227 U. S. 202, 218 (1913).

§ 309. Acts made Collectively Offensive by Intent.

While contemplated acts standing alone may not each constitute an offense if each had been done, yet where it appears that some of said acts conceivably might have been adequate to accomplish an undue restraint or a monopoly, *intent to produce such result* may operate to convert what was individually inoffensive into what was collectively of wider scope and prohibited by the act. *Nash* v. *U. S.*, 229 U. S. 373, 378 (1913), and cases cited.

§ 310. Presumption that Monopolistic Power will be Exercised.

"The power to restrict competition in interstate and international commerce, vested in a person or an association of persons by a contract or combination, is indicative of its character; for it is to the interest of the parties that such a power should be exercised, and the presumption is that it will be." (SANBORN, *Circuit Judge.*) *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 188. (C. C.—E. D. Missouri, E. D. 1909.)

"The unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey Corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise in and of itself in the absence of countervailing cir-

cumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy of the oil industry." (*Mr. Chief Justice* WHITE.) *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 75 (1911); *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 742. (D. C.—N. D. Ohio, E. D. 1913.)

§ 311. Good Motives.

The prohibitions of the act cannot "be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be of some good results." (*Mr. Justice* MCKENNA.) *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 49 (1912), citing *U. S.* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290; *Armour Packing Co.* v. *U. S.*, 209 U. S. 56, 62.

§ 312. No Willful Purpose.

It is no defense that there was no willful purpose or conscious design to violate the Act. Persons are presumed to have intended the necessary, natural and known effects or consequences of their agreements and acts, and if these effects or consequences be to unduly restrain interstate trade and commerce, then such agreements and acts are illegal, and the participants are chargeable with the consequences resulting. *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 189 (D. C.—N. D. New York, 1913), and cases cited.

§ 313. Intention to Benefit Public.

An honest intention on the part of the combining parties to benefit the general public by cheapening the cost of production and improving the quality of the article will

not save from the condemnation of the statute a combination which restrains interstate commerce in that article to any considerable degree, and places the power to control production and fix prices in the hands of a dominating corporation or of the combination itself. *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 190. (D. C.—N. D. New York, 1913.)

§ 314. Intention to Aid the Financially Weak.

An intent and purpose to aid the financially weak producer as against the strong will not save the combination from the condemnation of the statute where the main intent and purpose is to interfere with and control production and prices in interstate commerce. *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 190. (D. C.—N. D. New York, 1913.)

§ 315. Ignorance or Mistake of Judgment is no Excuse.

"We regard the contention that complainants are exempt from the doctrine *in pari delicto* because the parties acted in good faith and without intention to violate the law as without merit. With knowledge of the facts and of the statute the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other." (*Mr. Chief Justice* FULLER.) *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 298 (1905).

"The law is full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." (*Mr. Justice* HOLMES.) *Nash* v. *U. S.*, 229 U. S. 373, 377 (1913).

CHAPTER XIII

INDICTMENTS UNDER THE ACT

§ 316. Constitutionality.

The Sherman Act is not so indefinite and uncertain as to be unconstitutional as a criminal statute. *Nash* v. *U. S.*, 229 U. S. 373, 377–378 (1913); *U. S.* v. *Whiting*, 212 Fed. 466, 471. (D. C. Mass. 1914.)

§ 317. Proceedings Before Grand Jury.

"The grand jury is a part of the court in the exercise of criminal jurisdiction, and their proceedings are always subject to the control of the court. The court can at any time direct the grand jury to consider a particular accusation, or to investigate a supposed violation of the criminal law. If in the absence of such instructions the grand jury proceeds of its own motion, and is guilty of any abuse of its powers, the court can at any time intervene, correct or suppress the proceedings." (WALLACE, *Circuit Judge.*) *In re Hale*, 139 Fed. 496, 500. (C. C.—S. D. New York, 1905.)

Grand Juries "cannot make inquisitions into the general conduct or private business of their fellow citizens, and hunt up offenses by sending for witnesses to investigate vague accusations founded upon suspicions and indefinite rumors." (DICK, *District Judge.*) *U. S.* v. *Kilpatrick*, 16 Fed. 765, 769. (D. C.—W. D. North Carolina, 1883.)

The proceedings of the grand jury are not open to scrutiny, and the courts have never except in sporadic and

ill considered instances taken supervision over what evidence shall come before its members. *In re Kittle*, 180 Fed. 946, 947. (C. C.—S. D. New York, 1910.)

§ 318. Allegations Under First Section.

"The offense under the first section permits in one count an allegation of only a single transaction—that is, an allegation of making one contract, or engaging in one combination or conspiracy—so that while . . . such a combination or conspiracy, when once effected, may be continuous, yet only one contract or one conspiracy can properly be alleged in any one count." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Winslow*, 195 Fed. 579, 580. (D. C. Mass. 1912.)

§ 319. Allegations Under Second Section.

"The second section of the Act impliedly permits an indictment for building up a monopoly, as well as inaugurating or maintaining it, and therefore may relate to a series of acts following each other, all covered into one indictment or count, without the indictment or count being chargeable with duplicity." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Winslow*, 195 Fed. 579, 580. (D. C. Mass. 1912.)

§ 320. Reference to Other Counts.

"Modern practice fully justifies references in the later parts of an indictment to earlier parts of the same indictment for the details of matters properly set out in the earlier parts; . . . but this practice is subject to the fundamental rules of pleading that duplicity and repugnancies must be avoided." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Winslow*, 195 Fed. 579, 585. (D. C. Mass. 1912.)

§ 321. Must Appear that Restraint is Undue or Unreasonable.

It may appear that the indictment "would have been good if no question of reasonableness were open. . . . But under the Sherman Act that question is open, and the indictment must . . . allege facts warranting a finding by the jury that the restraint was unreasonable." Where "the facts alleged do not justify such a conclusion . . . no crime is therefore charged." Everything which the "indictment sets out may be true, and still the combination or conspiracy may not have extended beyond what was reasonable, nor have unduly affected the conditions under which other persons engaged in that industry, either buying or selling, did business." (MORTON, *District Judge.*) *U. S.* v. *Whiting*, 212 Fed. 466, 479. (D. C. Mass. 1914.)

§ 322. No Right to Unrestricted Competition.

The public has no right to unrestricted competition; it must appear that more has been done than was fairly justified by reasonable self-protection and that there has been a substantial interference with the interests of the public to its appreciable disadvantage. *U. S.* v. *Whiting*, 212 Fed. 466, 475–476. (D. C. Mass. 1914.)

§ 323. Doubtful Grounds of Demurrer.

Where the count of an indictment is complicated and contains a multiplicity of allegations and it is doubtful whether taking all such allegations to be true that the trial court would decide for the defendant, a demurrer to said indictment may be overruled without prejudice to the defendant to later insist upon the same defense at the hearing on the merits. *U. S.* v. *Winslow*, 195 Fed. 579, 581 (D. C. Mass. 1912); *Kansas* v. *Colorado*, 185 U. S. 125, 144–145 (1902).

§ 324. Defects of Form.

"No indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." *Revised Statutes*, Sect. 1025; *Tribolet* v. *U. S.*, 95 Pac. 85, 88 (Supreme Court, Arizona, 1908).

§ 325. Words of Statute.

"An indictment framed under this section (Sect. 2) should contain a distinct averment in the words of the statute, that, by means of the acts charged, the defendants had monopolized, or had combined or conspired to monopolize, trade and commerce among the several states or with foreign nations." (NELSON, *District Judge.*) *U. S.* v. *Greenhut*, 50 Fed. 469, 470. (D. C. Mass. 1892.)

"It is not sufficient to follow only the language of the statute. Where the act becomes illegal and an offense only from the means used to effect it, as in this statute, the indictment must state, where it is practicable, so much as will show its illegality and charge the accused with a substantial offense." (NELSON, *District Judge.*) *U. S.* v. *Nelson*, 52 Fed. 646, 647. (D. C. Minnesota, 1892.)

"We regard it as well settled by the authorities that an indictment, following simply the language of the act, would be wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense intended to be punished." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 111 (C. C.—S. D. Ohio, W. D. 1892), and cases cited.

"This statute is not one of the class where it is always

sufficient to declare in the words of the enactment, as it does not set out all the elements of a crime. . . . If it is claimed the means are illegal enough must be set out to enable the court to see that they are so, and to enable the defense to properly prepare to meet the charge made against it." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Patterson*, 55 Fed. 605, 638. (C. C. Mass. 1893.)

"It would not, I suppose, be enough, in an indictment, to charge conspiracy in restraint of trade in the language of the statute, but it would be necessary, unless the proposed restraint be shown to be in itself unlawful, to allege the illegal means intended to be used in order to effect the restraint." (WOODS, *Circuit Judge.*) *U. S.* v. *Debs*, 64 Fed. 724, 748. (C. C.—N. D. Illinois, 1894.)

§ 326. Combination of Act and Intent.

"It is not sufficient to charge solely an unlawful intent, or to aver merely that a combination or a course of business is in restraint of trade, or a monopoly of trade, in order to constitute a crime. Acts relied upon to make the offense must be stated. A combination of act and intent is needed to constitute a crime. No averment of intent alone is sufficient; neither is any amount of act alone; the two must combine." (RICKS, *District Judge.*) *In re Corning*, 51 Fed. 205, 210. (D. C.—N. D. Ohio, E. D. 1892.)

§ 327. General Purpose. Violence and Intimidation.

"Acts of violence and intimidation may be alleged as means to accomplish the general purpose. Instead of lying outside of the statute, they may aggravate the offense. They are within the logic and spirit of the statute, which are not to be defeated by distinctions which its letter does not suggest to the ordinary mind. Violence and

intimidation are as much within the mischief of the statute as negotiations, contracts, or purchases. The former are often used to compel the latter. This line of reasoning applies to both the first and second sections, and finds a sufficient place for every word in each." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Patterson*, 55 Fed. 605, 641. (C. C. Mass. 1893.)

§ 328. Facts Constituting Offense must be set Forth.

"Every offense consists of certain acts done or committed under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth." (JACKSON, *Circuit Judge.*) *In re Greene*, 52 Fed. 104, 112 (C. C.—S. D. Ohio, W. D. 1892), quoting from *U. S.* v. *Cruikshank*, 92 U. S. 542, 563.

§ 329. Defendant to be Notified with Certainty of Charge.

"It is a cardinal rule of criminal law that an indictment is not invalid for insufficiency if it embraces the language of the statute and covers and includes the essential ingredients of the offense with sufficient certainty to apprise the defendant of the charge that he will be called upon to meet." (HAZEL, *District Judge.*) *U. S.* v. *New Departure Mfg. Co.*, 204 Fed. 107, 111 (D. C.—W. D. New York, 1913), and cases cited.

"By the well-settled rules of pleading it is not sufficient to allege the means in general language, but, if it is claimed that the means used are illegal, enough must be set out to enable the court to see that they are so, and to enable the defense to properly prepare to meet the charge made against it." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Patterson*, 55 Fed. 605, 638. (C. C. Mass. 1893.)

"An indictment is sufficient when it contains a substantial accusation of crime, and its statements furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against further prosecution for the same offense, and when from it the court can determine that the facts charged are sufficient in law to support a conviction." (CARPENTER, *District Judge.*) *U. S.* v. *Swift*, 188 Fed. 92, 100 (D. C.—N. D. Illinois, E. D. 1911), citing *Hume* v. *U. S.*, 118 Fed. 689.

§ 330. Mere Allegation of Illegality.

"The fundamental rule . . . is that it is never sufficient to allege that an act is illegal, but the United States must allege something more which the court can see on the face of the indictment is illegal if the facts are proven as alleged." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Winslow*, 195 Fed. 579, 582 (C. C. Mass. 1912), quoting from *U. S.* v. *John Reardon & Sons Co.*, 191 Fed. 454, 456.

§ 331. All Necessary Facts must be Charged.

"Conspiracy is an offense which specifically demands the application of that wise and humane rule of the common law that an indictment shall state, with as much certainty as the nature of the case will admit, the facts which constitute the crime intended to be charged. It is never enough that the purpose or the means are so described that they may be unlawful. If that is left uncertain, the indictment is fatally defective. It must appear to the court that, if the facts alleged are proved as stated, without any additional fact, or circumstances, there can be no doubt of the illegality of the conduct charged, nor of its criminality." (CONNOR, *District Judge.*) *Ware-Kramer Tobacco Co.* v. *American Tobacco Co.*, 178 Fed. Rep. 117,

122 (C. C.—E. D. North Carolina, 1910), quoting from *Commonwealth* v. *Hunt*, 4 Met. 111, 125, and *State* v. *Parker*, 43 N. H. 85.

§ 332. Result of Omitting Essential Elements.

"The general rule in reference to an indictment (for conspiracy) is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not by implication, or by way of recital." (*Mr. Chief Justice* FULLER.) *Pettibone* v. *U. S.*, 148 U. S. 197 (1892); *Ware-Kramer Tobacco Co.* v. *Amer. Tobacco Co.*, 178 Fed. 117, 122. (C. C.—E. D. North Carolina, 1910.)

§ 333. Allegation of Means.

It is not necessary that an indictment should allege the means by which the combination or conspiracy was to be accomplished if it appears that the object to be attained is unlawful. *Tribolet* v. *U. S.*, 11 Ariz. 436, 445; 95 Pac. 85, 88. (Supreme Court, Arizona, 1908.)

"The allegations of what was done in pursuance of an alleged conspiracy are under this particular statute irrelevant, and cannot be laid hold of to enlarge the necessary allegations of the indictment and are of no avail." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Patterson*, 55 Fed. 605, 639 (C. C. Mass. 1893); *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 831 (C. C.—S. D. New York, 1906).

§ 334. Not Necessary to Prove Every Means Alleged.

It may be admitted that not each and every means tending to show a conspiracy are required to be proved, where sufficient of such means are proved to establish the con-

spiracy charged. *Nash* v. *U. S.*, 229 U. S. 373, 379–380 (1913).

§ 335. Overt Act.

No overt act need be alleged in an indictment for conspiracy under the Act. "The Sherman Anti-Trust Act punishes the conspiracies at which it is aimed on the common law footing, that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability." (*Mr. Justice* HOLMES.) *Nash* v. *U. S.*, 229 U. S. 373, 378 (1913); *U. S.* v. *New Departure Mfg. Co.*, 204 Fed. 107, 111 (D. C.—W. D. New York, 1913), and cases cited.

§ 336. Allegation of Time.

Where the period of operation of the conspiracy is definitely set forth, the allegation of a single precise date is not essential when the coöperation of the conspirators does not rest alone upon a single unlawful agreement, but upon a plot contemplating a continuous result accomplished by the continued coöperation of the conspirators. *U. S.* v. *Kissel & Harned*, 218 U. S. 601, 607–608 (1910); *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 830 (C. C.—S. D. New York, 1906).

§ 337. Pleadings of Numerous Documents.

Whenever documents material to the indictment are "so numerous that they cannot be stated at length, or in detail, without incumbering the record to an extent beyond all practical rules of convenience, they may be stated generally." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Winslow*, 195 Fed. 579, 582. (D. C. Mass. 1912.)

§ 338. Duplicity.

"A combination in restraint of trade may design to

accomplish its object in many ways, and the enumeration of the various means adopted does not render the indictment bad for duplicity. Duplicity in an indictment means the charging of more than one offense, not the charging of a single offense committed in more than one way." (CARPENTER, *District Judge.*) *U. S.* v. *Swift*, 188 Fed. 92, 97 (D. C.—N. D. Illinois, E. D. 1911), and cases cited.

§ 339. Label of Offense.

"It makes no difference what the grand jury labels the offense. The question is,—do the facts as stated amount in law to any offense? If the facts charged in this indictment constitute a contract, combination in the form of trust or otherwise, or a conspiracy in restraint of trade or commerce, it is a valid indictment." (CARPENTER, *District Judge.*) *U. S.* v. *Swift*, 188 Fed. 92, 98. (D. C.—N. D. Illinois, E. D. 1911.)

§ 340. Different Counts on Same Facts.

All of the counts of an indictment may be based upon the same allegations of fact, so that it may be asserted in effect that the same doings, facts and circumstances constitute at once a combination, a conspiracy, and a monopoly. *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 825. (C. C.—S. D. New York, 1906.)

That in such a case fines may be imposed under each count, see *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 836, 838. (C. C.—S. D. New York, 1907.)

§ 341. Allegations of Monopoly.

An indictment under section two of the Act should allege "that by means of the acts charged, the defendant had monopolized, or attempted to monopolize, or had

combined or conspired to monopolize trade and commerce among the several states or with foreign nations." (NELSON, *District Judge.*) *U. S.* v. *Greenhut*, 50 Fed. 469, 470. (D. C. Mass. 1892.)

§ 342. Successful Results.

"A conspiracy to monopolize is a conspiracy to create a monopoly, and unless it appears from the indictment that the conspiracy in question, if successfully carried out, would have resulted in a monopoly, no violation of the federal statute is charged." (NOYES, *Circuit Judge.*) *U. S.* v. *Patten*, 187 Fed. 664, 672. (C. C.—S. D. New York, 1911.)

§ 343. Active Parties Principal.

"All parties active in promoting a misdemeanor, whether agents or not, are principals." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Winslow*, 195 U. S. 579, 581. (D. C. Mass. 1912.)

§ 344. Monopoly by one Person only.

"Section 2 of the Act undoubtedly renders it possible for one single person to be punished under this statute for either a monopoly or an attempt to monopolize." (HOUGH, *District Judge.*) *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 836. (C. C.—S. D. New York, 1906.)

§ 345. Conspiracy or Combination. One Party Defendant.

An indictment does not lie against one person solely for conspiracy or combination. "It is difficult to imagine one person combining, and obviously one person cannot conspire." (HOUGH, *District Judge.*) *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 836. (C. C.—S. D. New York, 1906.)

In an action of tort under Section 7, however, one of a

combination or an agreement in restraint of trade may be sued separately, it not being necessary to join all parties defendant. *City of Atlanta* v. *Chatt. F. & P. Works*, 127 Fed. 23, 26 (C. C. A. Sixth Circuit, 1903), and cases cited.

§ 346. Other Offenses Indirectly Connected.

"It is a fundamental and essential principle of law, and of social order, that all engaged in the commission of a particular crime, whether as counselors, aiders, abettors, or otherwise, are individually responsible criminally for other offenses which result naturally from the commission or attempt to commit the crime intended; but as agreement and intent are of the essence of a conspiracy, a conspiracy to commit a particular offense can hardly be deemed to include another conspiracy to commit another offense, unless the latter was the necessary result of the commission or attempt to commit the crime intended, or to such a degree the probable result that it could itself be charged in the indictment to have been intended." (WOODS, *Circuit Judge.*) *U. S.* v. *Debs*, 64 Fed. 724, 753. (C. C.—N. D. Illinois, 1894.)

§ 347. Summons to Defendants Outside of District.

Where a district court has jurisdiction of the subject-matter or part of the defendants residing within the district, the attendance of the defendants residing without the district may be compelled under Rev. St., Sect. 716, providing for the issuance of all writs which are necessary for the proper exercise of the judicial functions of the court. *U. S.* v. *Virginia-Carolina Chemical Co.*, 163 Fed. 66, 67 et seq. (C. C.—M. D. Tennessee, 1908.)

§ 348. Corporation Party to Conspiracy.

A corporation may be one of the parties to a conspiracy

forbidden by the Act, there is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 835. (C. C.—S. D. New York, 1906) and cases cited.

§ 349. Corporation and Stockholders.

"The courts have conclusively presumed that the relation between a corporation and one of its stockholders is not such that the latter can be held to a criminal responsibility for a violation of the law in which he is not alleged to have personally participated." (HOUGH, *District Judge.*) *U. S.* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 832. (C. C.—S. D. New York, 1906.) See also *Union Pacific Coal Co.* v. *U. S.*, 173 Fed. 737, 744, (C. C. A. Eighth Circuit, 1909).

§ 350. Officers of a Corporation.

"Neither in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present and efficient actor." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Winslow*, 195 U. S. 579, 581. (D. C. Mass. 1912.)

§ 351. Instruction of Verdict.

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and, where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction." (SANBORN, *Circuit Judge.*) *Union Pacific Coal Co.* v. *U. S.*, 173 Fed. 737, 740. (C. C. A. Eighth Circuit, 1909) and cases cited.

§ 352. Construction of Indictment on Appeal.

Under the Criminal Appeals Act the limitations upon the jurisdiction of the Supreme Court are such that they are obliged to accept the construction of the court below, and have no jurisdiction to review the interpretation of pleadings so construed. *U. S.* v. *Patten*, 226 U. S. 525, 535 (1913), and cases cited in the foot-note. *U. S.* v. *Winslow*, 227 U. S. 202, 216–217 (1913).

§ 353. Removal of Citizen to Another Federal District.

Upon the application by the district attorney for a warrant for removal, "it is the duty of the district judge before ordering the removal of a citizen to a district court for trial to scrutinize the indictment, and to refuse the warrant in case it appears upon the face of the indictment either that the crime alleged was not committed in the district to which the removal is asked, or that this indictment does not sufficiently charge an offense under the law, or for other material defects in that instrument, or in the act upon which it is founded." (RICKS, *District Judge.*) *In re Corning*, 51 Fed. 205, 206. (D. C. Ohio, E. D. 1892.)

"This is a country of vast extent, and it would be a grave abuse of the rights of the citizen, if, when charged with alleged offenses committed perhaps in some place he had never visited, he were removed to a district thousands of miles from his home, to answer to an indictment fatally defective, on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending." (LACOMBE, *Circuit Judge.*) *In re Terrell*, 51 Fed. 213, 214. (C. C.—S. D. New York, 1892.)

"It is not disputed by the district attorney that it is not only the right, but the duty, of district court, before ordering removal, to look into the indictment so far as to

be satisfied that an offense against the United States is charged, and that it is such an offense as may lawfully be tried in the forum to which it is claimed the accused should be removed; and the same right and duty arises upon *habeas corpus*, whether the petitioner is held under the warrant of removal issued by the district judge whose decision is thus reviewed, or under the warrant of the commissioner to await the action of the district judge." (LACOMBE, *Circuit Judge.*) *In re Terrell*, 51 Fed. 213, 214 (C. C.—S. D. New York, 1892), and cases cited.

CHAPTER XIV

EQUITABLE PROCEEDING UNDER SECTION FOUR AND UNDER GENERAL EQUITY JURISDICTION

§ 354. Petition Under Anti-Trust Laws.

"The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." *Sherman Anti-Trust Law* (Act of July 2, 1890), Sect. 4. *Clayton Act* (Act of October 15, 1914), Sect. 15, containing similar language.

§ 355. Circuit Court Succeeded by District Court.

Under the Judicial Code, in effect since January 1, 1912, the circuit courts of the United States were abolished, and jurisdiction of all matters formerly exercised by such courts was conferred upon the district courts. Sections 289, 290, *Judicial Code.*

Congress in enacting the Judicial Code and abolishing the Circuit Courts did not thereby deprive a plaintiff under the Act of the right to sue the defendant in the district where he might be found regardless of diversity of citizenship. *Wogan Bros.* v. *Am. Sugar Refining Co.*, 215 Fed. 273, 274. (D. C.—E. D. Louisiana, 1914.)

§ 356. Non-Resident Defendants.

"Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof." *Sherman Anti-Trust Law* (Act of July 2, 1890), Sect. 5. *Clayton Act* (Act of October 15, 1914), Sect. 15.

§ 357. Where to be Instituted.

The Government may institute its equitable proceeding in any district where any one of the resident defendants could be found and served with process; and where the complainant demands it, the court should summon and hear every interested party in reach of its process in or out of the district in order that so far as possible the entire matter may be adjudicated. *U. S.* v. *Standard Oil Co.*, 152 Fed. 290, 296. (C. C.—E. D. Missouri, E. D. 1907.)

As against a corporate defendant, the suit may be brought not only in the judicial district whereof it is an inhabitant, but also in any district where it may be found or transacts business, and all process in such case may be served in the district of which it is an inhabitant or wherever it may be found. *Clayton Act* (Act of October 15, 1914), Sect. 12.

§ 358. Case to be of Equitable Cognizance.

"The jurisdiction in equity, though given in broad and general terms, will be deemed to be limited so as not to extend to a case which is not of equitable cognizance." (WOODS, *Circuit Judge.*) *U. S.* v. *Debs*, 64 Fed. 724, 753. (C. C.—N. D. Illinois, 1904.)

§ 359. Construction of Bill in Equity.

"Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme." (*Mr. Justice* HOLMES.) *Swift & Co.* v. *United States*, 196 U. S. 375, 395 (1905).

§ 360. Enjoining Threatened Crimes.

"It is a general rule of equity jurisprudence that courts of chancery will not interpose where there is an adequate remedy at law, nor will they ordinarily interpose to prevent the commission of a crime. A well and long established exception to this rule is that where parties threaten to commit a criminal offense, which, if executed against private property, would destroy it, and occasion irreparable injury to the owner, and especially where such destruction would occasion a multiplicity of suits to redress the wrong if committed, courts of equity may interpose by injunction to restrain the threatened injury." (PHILIPS, *District Judge.*) *U. S.* v. *Elliott*, 64 Fed. 27, 31. (C. C.—E. D. Missouri, 1894.)

Within such exception also fall injunctions under Section 4 seeking to restrain the commission of offenses

prohibited by the Sherman Anti-Trust Act where such offenses are likely to affect the rights of the public, it being permissible to the government representing the whole people to interpose by injunction to protect and preserve the public welfare and well-being. *U. S.* v. *Elliott*, 64 Fed. 27, 32–34. (C. C.—E. D. Missouri, 1894); *U. S.* v. *Debs*, 64 Fed. 724, 753–754. (C. C.—N. D. Illinois, 1894.)

§ 361. Necessity of Alleging Irreparable Injury. Giving of Security.

It has been said under Section 4 of the Sherman Law prior to the Clayton Act that it was not necessary to justify the court in issuing a restraining order, to require an allegation and showing of irreparable injury on the part of the government or those for whose benefit it may be assumed the action was brought; the court being expressly empowered in said section at any time to make such temporary restraining order or prohibition as shall be deemed just in the premises. *U. S.* v. *Coal Dealers' Assn.*, 85 Fed. 252, 259 (C. C.—N. D. California, 1898), and cases cited.

In private suits in equity, however, now brought under the Clayton Act, a showing of irreparable injury is now required either by affidavit or verified bill, before a preliminary injunction or a temporary restraining order will issue. Whether such showing is now required of the government in proceedings under Section 4 of the Sherman Law is not clear. *Clayton Act* (Act of October 15, 1914), Sects. 16 and 17.

The language of Section 18 of the Clayton Act appears to be broad enough to refer not only to private causes but also to government suits, in which view no restraining order or interlocutory order of injunction could issue at the instance of the government except upon the giving of

security by the United States. But Section 15 of the same Act provides that the Court may in government proceedings in equity "at any time make such temporary restraining order or prohibition as shall be deemed just in the premises," nothing being said about security; and it would seem that the application of Section 18 should be limited solely to private suits, since in the absence of precise language it is contrary to the dignity of a sovereign power to require it to give security against loss by the exercise of its paramount authority.

§ 362. Injunction not Void if Bill Contains a Technical Defect.

A mere defect that could be reached by demurrer in a bill over which the court has been given jurisdiction by the express words of the statute does not make an injunction issued upon said bill a nullity or permit it to be violated with impunity. *U. S.* v. *Agler*, 62 Fed. 824, 826. (C. C. Indiana, 1894.)

§ 363. Bill Need not State Statutory Amount in Controversy.

"The bill need not state, in so many words, that a certain amount exceeding one thousand dollars is in controversy in order that this Court (the Supreme Court) may have jurisdiction on appeal. The statutory amount must as a matter of fact be in controversy, yet that fact may appear by affidavit after the appeal is taken to this Court (the Supreme Court), . . . or in such other manner as shall establish it to the satisfaction of the Court." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 310 (1897)

§ 364. Association of Numerous Offenders.

"It is contended that, as the Coal Dealers' Association

is an unincorporated company, it cannot be brought into court by making it a party defendant by that name. In equity, the action must be against the individuals comprising such an association; but there is this exception: Where the parties are numerous, some of them may be brought in as representing the whole association." (MORROW, *Circuit Judge.*) *U. S.* v. *Coal Dealers' Assn.*, 85 Fed. 252, 260. (C. C.—N. D. California, 1898.)

§ 365. Undecided Suits as a Cause of Action.

Where a plaintiff has assigned all his property used in his business to a combination in restraint of trade, and where actions have been brought against him by said combination replevying said property and seeking damages, the plaintiff until the decision of said actions, cannot bring and maintain suit under Section 7, where the only injuries complained of are those resulting from said actions. *Bishop* v. *American Preservers' Co.*, 51 Fed. 272, 273, 274. (C. C.—N. D. Illinois, 1892.)

§ 366. Proper Officers of Government to Bring Bill.

"Congress has seen fit, on grounds of public policy, to authorize the law officers of the government to appeal to the courts of the United States by a bill in equity filed in behalf of the people of the United States, to arrest, by writ of injunction or prohibition, the commission of acts which are designed to obstruct the free flow of commerce between the states, and no one can doubt the power of Congress to confer such authority. From the very foundation of the government, it has been accepted as a proposition which admitted of no controversy that the right to regulate commerce among the several states, and to pass laws to protect commerce of that character, pertained to the general government, and that its power in that re-

spect was plenary and paramount." (THAYER, *District Judge.*) *U. S.* v. *Elliott*, 62 Fed. 801, 802. (C. C.—E. D. Missouri, E. D. 1894.)

§ 367. Private Person may now Sue for Injunctive Relief Except in Cases Against Common Carriers.

It is now provided by the Clayton Act that any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any federal court having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws when and under the same principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of a proper bond and showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. Equity suits, however, against common carriers subject to the Interstate Commerce Act, except on behalf of the government, are not authorized. *Clayton Act* (Act of October 15, 1914), Sect. 16.

Prior to the date of the Clayton Act, it was, however, decided in a number of cases, that except in cases involving general equity jurisdiction, a private person had no right to bring a bill in equity under the Sherman Law, the government at that time being the only party who could obtain injunctive relief under its provisions. See *Blindell* v. *Hagan*, 54 Fed. 40; *Pidcock* v. *Harrington*, 64 Fed. 821; *Gulf, C. & S. F. Ry. Co.* v. *Miami S. D. Co.*, 86 Fed. 407, 421; *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 Fed. 659, 663; *Metcalf* v. *Am. School Furniture Co.*, 122 Fed. 115, 126; *Nat'l Fireproofing Co.* v. *Mason Builders Assn.*, 169 Fed. 259; *Corey* v. *Independent Ice Co.*, 207 Fed. 459, 461; *Irving* v. *Neal*, 209 Fed. 471, 477.

But the present statute has superseded the doctrine laid down in such cases.

§ 368. Statute of Limitations in Private Cases.

Where criminal or equitable proceedings are instituted by federal authority under the anti-trust laws, the running of the statute of limitations as against each and every private right of action involving the subject-matter thereof in whole or in part is suspended during the pendency of such proceedings. *Clayton Act* (Act of October 15, 1914), Sect. 5.

§ 369. Effect of Final Judgment or Decree in Government Proceedings upon Private Suits.

Except in certain cases relating to consent judgments and decrees, a final judgment or decree rendered subsequent to the date of the Clayton Act in any government proceeding under the anti-trust laws to the effect that a defendant has violated such laws shall be prima facie evidence against such defendant in any suit or proceeding by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. *Clayton Act* (Act of October 15, 1914), Sect. 5.

§ 370. Private Person may also Invoke General Equity Jurisdiction.

"We do not doubt the general jurisdiction of the circuit court as a court of equity to afford preventive relief in a proper case against threatened injury about to result to an individual from any unlawful agreement, combination, or conspiracy in restraint of trade." (McCORMICK, *Circuit Judge.*) *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 Fed. 407, 421 (C. C. A. Fifth Circuit, 1898); *Leonard* v. *Abner-Drury Brewing Co.*, 25 Appeal (D. C.) Cases, 161,

176–177 (Court of Appeals, D. C. 1905); *Bigelow* v. *Calumet & Hecla Mining Co.*, 155 Fed. 869, 876–879 (C. C.—W. D. Michigan, N. D. 1907); *De Koven* v. *Lake Shore & M. S. Ry. Co.*, 216 Fed. 955, 957. (D. C.—S. D. New York, 1914.)

"We concur in the conclusion reached by the learned judge who decided the case below, as expressed in his opinion, and which is made a part of the record, that the jurisdiction is maintainable on general principles of equitable jurisdiction, and a careful examination of the case satisfied us that under all the facts before it there was no error in the court awarding a preliminary injunction." (TOULMIN, *District Judge.*) *Hagen* v. *Blindell*, 56 Fed. 696, 697. (C. C. A. Fifth Circuit, 1893.) *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 Fed. 407, 421. (C. C. A. Fifth Circuit, 1898.)

"There can be equity jurisdiction only when the case in question belongs to one of the recognized classes of cases over which equity has jurisdiction. The question, therefore, is, does this case belong to one of those recognized classes? If it does, it is because the nature of the alleged injury is such that it would be difficult to establish in a suit at law the damage of the complainant, and because to entertain it would prevent a multiplicity of suits." (BILLINGS, *District Judge.*) *Blindell* v. *Hagan*, 54 Fed. 40, 41–42. (C. C.—E. D. Louisiana, 1893.)

"When a criminal act is threatened, which is liable to occasion irreparable injury to private persons, or which would give rise to a multitude of suits at law to redress the wrong, if committed, a court of equity may issue an injunction, at the instance of an individual, against parties who threaten to commit the wrong." (THAYER, *District Judge.*) *U. S.* v. *Elliott*, 62 Fed. 801. (C. C.—E. D. Missouri, E. D. 1894.)

"'The foundation of this jurisdiction of equity is the probability of irreparable mischief, the inadequacy of a pecuniary compensation, and the prevention of a multiplicity of suits.' (Laussat's Notes to Fonblanque's Equity at page 3.) The difficulty has been in applying this principle. Where there is a large combination of persons to interfere with a party's business by violence, the equity jurisdiction, if maintainable at all, is maintainable on either of two grounds,—the nature of the injury, including the difficulty of establishing in a suit at law the amount of actual damages suffered, or the prevention of a multiplicity of suits." (BILLINGS, *District Judge.*) *Blindell* v. *Hagan*, 54 Fed. 40, 42. (C. C.—E. D. Louisiana, 1893.)

"So in cases of trespass, where a business is interrupted, and the profits of pending enterprises and voyages are intercepted, the party injured must fail of recovering full compensation, for his damages must at law be largely conjectural; and for this reason, as well as to prevent a multiplicity of suits, he may, by an injunction in equity, arrest the threatened wrongdoing, and prevent the consequent injury, which is irremediable, because it consists in the loss of profits which are not susceptible of proof." (BILLINGS, *District Judge.*) *Blindell* v. *Hagan*, 54 Fed. 40, 42–43. (C. C.—E. D. Louisiana, 1893.)

§ 371. Minority Stockholder.

"What I decide is that an equity suit cannot be maintained under Section seven of the Anti-trust Act by a single stockholder to recover threefold damages for injuries sustained by his corporation." (COXE, *Circuit Judge*, sitting in the District Court, quoted and affirmed by Circuit Court of Appeals.) *Fleitmann* v. *United Gas Improvement Co.*, 211 Fed. 103, 105 (C. C. A. Second

Circuit, 1914); *Post* v. *Bucks Stove & Range Co.*, 200 Fed. 918, 920 et seq. (C. C. A. Eighth Circuit, 1912.)

The reason of such rule is that "an action to recover treble damages under section seven of the act must be an action at law, where the defendants have the constitutional right to a jury trial." (*Per Curiam.*) *Fleitmann* v. *United Gas Improvement Co.*, 211 Fed. 103, 105. (C. C. A. Second Circuit, 1914.)

"The right of action created by this section is in the corporation alone representing all its stockholders." (DODGE, *Circuit Judge.*) *Corey* v. *Independent Ice Co.*, 207 Fed. 459, 460. . (D. C. Mass. 1913) and cases cited.

This is true even where demand has been made upon the directors or majority stockholders to bring such a suit and they have failed or refused to do so. See *Corey* v. *Independent Ice Co.*, and *Fleitmann* v. *United Gas Improvement Co.*, *supra.*

§ 372. Bill Seeking Injunction and Treble Damages.

A bill in equity under the act seeking an injunction and treble damages was held to be multifarious because "it joins two distinct causes of action not necessarily connected or blended, and joins an action at law with a suit in equity. . . . The claims for damages under the anti-trust law of July 2, 1890, and the facts set forth upon which the complainants ask that the defendant be enjoined from using complainant's trade-mark and trade-name, constitute distinct causes of action, having no connection or relation to each other; and, besides, one is a cause of action triable at law, while the other is of equitable cognizance." (THOMPSON, *District Judge.*) *Block* v. *Standard Distilling Co.*, 95 Fed. 978, 979–980. (C. C.—S. D. Ohio, W. D. 1899.)

So also the inclusion of an individual claim for treble

damages under the federal anti-trust law for injuries sustained to her business or property in a bill in equity brought by a minority stockholder suing for herself and several other stockholders and praying for equitable relief, is multifarious. *Metcalf* v. *Am. School Furniture Co.*, 108 Fed. 909, 911–912. (C. C.—W. D. New York, 1901.)

§ 373. Preliminary Injunction or Restraining Order Without Notice.

No preliminary injunction shall be issued without notice to the opposite party, and no temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. Any such order shall by its terms expire within ten days unless extended for good cause shown. When the order is granted without notice, the matter of the issuance of a preliminary injunction shall be heard at the earliest possible time and shall take precedence of all matters except older matters of the same nature. If the application is not then proceeded with, the restraining order shall be dissolved. Upon two days' notice, the opposing party may move to dissolve or modify the order, and the judge shall hear and determine the motion as expeditiously as the ends of justice require. *Clayton Act* (Act of October 15, 1914), Sect. 17.

Where the bare statements of a government bill in equity under the Sherman Law are so general in their character, and quite too barren of any averments of specific facts to enable the court to determine whether the general averments of fact are true, particularly in view of

the affidavits of the defendants denying some of the most important of them, and no bond is given as in case of a private suitor, the rule is to refuse the preliminary injunction and abide the hearing. *U. S.* v. *Jellico Mountain Coke & Coal Co.*, 43 Fed. 898, 899. (C. C.—M. D. Tennessee, 1890.)

§ 374. Relief Determined by Status at Date of Bill.

"I know of no rule which is better settled than that the question as to the maintenance of a bill, and the granting of relief to a complainant, is to be determined by the status existing at the time of filing the bill. Rights do not ebb and flow. If they are invaded, and recourse to courts of justice is rendered necessary, it is no defense to the invasion of a right, either admitted or proved, that since the institution of the suit the invasion has ceased. With emphasis would this be true where, as here, the right to invade is not disclaimed." (BILLINGS, *District Judge.*) *U. S.* v. *Workingmen's Amalg. Council*, 54 Fed. 994–995, 996. (C. C.—E. D. Louisiana, 1893.)

§ 375. Voluntary Dissolution does not Oust Jurisdiction.

"Although the general rule is that equity does not interfere simply to restrain a possible future violation of law, yet where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law and the jurisdiction of the court has attached by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had, and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 309 (1897).

"If the injunction were limited to the prevention of any action by the defendants under the particular agreement set out, or if the judgment were to be limited to the dissolution of the association mentioned in the bill, the relief obtained would be totally inadequate to the necessities of the occasion, provided an agreement of that nature were determined to be illegal. The injunction should go further, and enjoin defendants from entering into or acting under any similar agreement in the future. In other words, the relief granted should be adequate to the occasion." (*Mr. Justice* PECKHAM.) *U. S.* v. *Freight Assn.*, 166 U. S. 290, 308 (1897).

§ 376. Court may Forbid Further Interference with Competition.

While the defendants cannot be ordered to compete, they "properly can be forbidden to give directions or to make agreements not to compete." The court at least may remove illegal barriers which will render such competition impracticable. *Swift & Co.* v. *U. S.*, 196 U. S. 375, 400 (1905); *U. S.* v. *Reading Co.*, 226 U. S. 325, 369–370 (1913).

§ 377. Proper Measure of Relief.

In considering and determining the relief proper to be given, the action of the court is to be guided: (1) by "the duty of giving complete and efficacious effect" to the act; (2) by "the accomplishing of this result with as little injury as possible to the interest of the general public," and (3) by "a proper regard for the vast interests of private property which may have become vested in many persons" without "any guilty knowledge or intent" on their part. *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 185 (1911).

§ 378. Case may Stand upon its own Facts.

Each case under the Sherman Act must stand upon its own facts; and methods adopted in other cases are not necessarily to be followed as precedents, except where the same situation is presented. *U. S.* v. *Union Pac. Ry. Co*, 226 U. S. 470, 474 (1913); *U. S.* v. *Great Lakes Towing Co.*, 217 Fed. 656, 659. (D. C.—N. D. Ohio, E. D. 1914.)

§ 379. Remedying Results from Purely Administrative Conditions.

"In cases where the illegality of the combination results alone from purely administrative conditions, which may be effectively eliminated, a prohibition of the offending practices may be sufficient to vindicate the statute." (*Per Curiam.*) *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733, 746. (D. C.—N. D. Ohio, 1913.)

§ 380. Where Result is from both Monopoly and Continued Attempted Monopoly.

Ordinarily where it is found that acts have been done in violation of the statute, adequate measure of relief will result from the restraining of such acts in the future; but where the condition which is in violation of the statute is both a continued attempt to monopolize and a monopolization, broader and more controlling remedies are required. In the latter case it is essential not only to forbid the further commission of the wrongful acts, but also to effectually dissolve the combination found to exist in violation of the statute. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 77–78 (1911).

The main purpose of the Act is to forbid combinations and conspiracies in undue restraint of trade or tending to monopolize it, and effectually to terminate their existence. Property interests involved should be conserved so

far as consistent with such purpose, but never in such wise as to sacrifice the object and purpose of the statute. *U. S.* v. *Union Pac. Ry. Co.*, 226 U. S. 470, 476–477 (1912).

§ 381. Injunction Preferable to Dissolution.

"While the power (of the court) to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the legislative policy, as disclosed by the terms of the act, is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate." (*Per Curiam.*) *U. S.* v. *Great Lakes Towing Co.*, 217 Fed. 656, 658. (D. C.—N. D. Ohio, E. D. 1914.)

§ 382. Prohibition Should not Extend to all Possible Violations.

The continuing and threatened illegal acts may be forbidden, where they have a direct and substantial effect to restrain interstate commerce. But the court should not prohibit all possible violations of the law. Past unlawful competition does not deprive parties of their right to conduct lawful competition. *U. S.* v. *Standard Oil Co.*, 173 Fed. 177, 192. (C. C.—E. D. Missouri, E. D. 1909.)

§ 383. Injunction Against Unknown Defendants.

"I think the injunction as against unknown defendants is valid and binding when the injunction order is served upon them, although they are not at the time parties to the suit. Indeed, I think an injunction that is issued against one man enjoining or restraining him, and all that give aid and comfort to him, or all that aid and abet him, is valid against everybody that aids or gives countenance to the man to whom it is addressed. I do not entertain any doubt about that." (BAKER, *District Judge.*) *U. S.* v. *Agler*, 62 Fed. 824, 827. (C. C. Indiana, 1894.)

§ 384. On Whom Injunction is Binding.

"Every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same." *Clayton Act* (Act of October 15, 1914), Sect. 19.

§ 385. Injunctions Relative to Employees and Disputes Concerning Employment.

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property and property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney." *Clayton Act* (Act of October 15, 1914), Sect. 20.

§ 386. Injunctions Relative to Termination of Employment, Persuasion of Others, Ceasing to Patronize, etc.

"No such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from

terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending to any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peacefully assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." *Clayton Act* (Act of October 15, 1914), Sect. 20.

§ 387. Injunctions Issued by Court Without Jurisdiction.

"It is well settled that a restraining order or injunction issued by a judicial tribunal without jurisdiction of the subject-matter is coram non judice and void." (BAKER, *District Judge.*) *U. S.* v. *Agler*, 62 Fed. 824. (C. C. Indiana, 1894.)

§ 388. No Rule Requiring Civil to Await Criminal Action.

"An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. Besides a suit by the Government there may be an action for damages by a 'person injured by reason of anything forbidden by the Act.' Must it also wait? . . . The most favorable

view which can be taken of the rights of defendants in such situation is that they depend upon the discretion of the court in the particular case." (*Mr. Justice* MCKENNA.) *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 52 (1912).

§ 389. Expediting Certificate.

In an equity suit under Section 4 of the Sherman Law, the Attorney General may file a certificate that the case is of general public importance, and thereupon the case shall be given precedence over others and in every way expedited and early assigned for hearing before a court of three or more judges, constituted as required by the Act relative thereto. *Act of June 25, 1910* (36 Stat. 854).

Where such judges are equally divided in opinion or where the majority are unable to agree, the Chief Justice of the United States may appoint some circuit judge to sit with said judges upon a reargument and to assist in determining said cause. *Act of June 25, 1910* (36 Stat. 854).

It certainly cannot be maintained that the statute relating to filing of an expediting certificate is unconstitutional. *U. S.* v. *N. Y., N. H. & H. Ry. Co.*, 165 Fed. 742, 745. (C. C. Mass. 1908.)

§ 390. Single Justice may Enter Decree on Mandate.

Even where a certificate under the expedition act was filed in the court below when the action was originally instituted, the decree on the mandate of the Supreme Court may nevertheless be entered by any district judge presiding, or the circuit judge assigned to the said court, under the provisions of section 18 of the Judicial Code. *U. S.* v. *Terminal Assn. of St. Louis*, 197 Fed. 446, 447, 450. (D. C.—E. D. Missouri, E. D. 1912.)

§ 391. Appeal in Government Suit Lies only to Supreme Court.

In every suit in equity under the federal anti-trust acts, an appeal from the final decree of the district court lies only to the Supreme Court, and must be taken within sixty days from the entry thereof. *Expedition Act*, 32 Stat. 823, Sect. 2.

CHAPTER XV

ACTION AT LAW UNDER THE ANTI-TRUST LAWS

§ 392. Statutory Provisions.

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may use therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *Act of October 15, 1914* (Clayton Act), Sect. 4. See also *The Sherman Anti-trust Law* (Act of July 2, 1890), Sect. 7.

§ 393. Constitutionality.

Congress had the power to enact Section 7 of the Sherman Anti-Trust Law authorizing recovery of treble damages for injuries sustained by a private individual as therein set forth. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 396–397 (1906).

§ 394. State Practice and Pleading.

The action is brought on the law side of the court; and in conformity with the practice act, the state practice and pleading within which the district court is situated is followed as near as may be. *Monarch Tobacco Works* v. *Am. Tobacco Co.*, 165 Fed. 774, 782. (C. C.—W. D. Kentucky, 1908.)

While the practice of the state court is to be followed "as near as may be," it is not to be adhered to where it would be inconsistent with the terms or defeat the purposes of the legislation of Congress; if the state practice is not adequate to afford the relief which Congress has provided in a given statute, resort must be had to the power of the federal court to adapt its practice and issue its writs and administer its remedies so as to enforce the federal law. *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.*, 196 Fed. 514, 516 (D. C.—New Jersey, 1912), and cases cited.

§ 395. Limitation of Actions.

Except where a government suit in equity or criminal prosecution is instituted under the anti-trust laws, an action for damages under section seven of the act is subject to the statute of limitations of the state within which the federal district is located. *Am. Tobacco Co.* v. *People's Tobacco Co.*, 204 Fed. 58, 60–61. (C. C. A.—Fifth Circuit, 1913.)

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof." *Act of October 15, 1914* (Clayton Act), Sect. 5.

§ 396. Fictitious Action.

"As a rule an action at law cannot be maintained for bringing even a false and fictitious action against a person. The commencement of a suit at law is an assertion of the

right in a manner provided by law, and persons so commencing suits cannot be subjected to other actions or penalties by reason of their having done so, or for asserting or prosecuting what they claim as a legal right. The remedy of the party so sued is in defending the suit, and, if he is successful in his defense, he recovers costs, and sometimes damages. (BLODGETT, *District Judge.*) *Bishop* v. *American Preservers' Co.*, 51 Fed. 272, 273 (C. C.—N. D. Illinois, 1892), and cases cited.

§ 397. Averments of Jurisdiction.

"The doctrine of the federal courts is unquestionably that in matters of pleading, inferences from equivocal and uncertain allegations cannot be followed, and that, where the question relates to jurisdiction, argumentative inferences are not sufficient to establish jurisdiction. The averments must be positive; and the court cannot retain jurisdiction over a doubtful record to say whether or not the intention was to bring the case under a specific act." (HALE, *District Judge.*) *Strout* v. *United Shoe Machinery Co.*, 195 Fed. 313, 317. (D. C.—Mass. 1912.)

§ 398. "Where Defendant . . . is Found."

"It is clear . . . that for violations of the Anti-Trust Act the defendant may be sued in any district in which 'it is found,' and that it 'is found' wherever there is some agent or representative upon whom service of process may be made." (CONNOR, *District Judge.*) *Ware-Kramer Tobacco Co.* v. *Amer. Tobacco Co.*, 178 Fed. Rep. 117, 120. (C. C.—E. D. North Carolina, 1910.)

§ 399. In Business Within the District.

"It is essential, in order to support the jurisdiction of the court that it shall appear somewhere on the record either in the application for the writ or accompanying its

service or in the pleadings or the findings of the court that the corporation is engaged in business in the district." (THOMPSON, *District Judge.*) *Dodson* v. *Farbenfabriken of Elberfield Co.*, 206 Fed. 125, 127. (D. C.—E. D. Pennsylvania, 1913.)

§ 400. Defendants may be Sued Separately.

"It is well settled that the defendants may be sued separately. 'When several persons have been jointly concerned in the commission of a wrongful act, they may all be charged jointly as principals, or the plaintiff may sue all of them separately, torts being in their nature several, even when the wrongful act was jointly committed.'" (CONNOR, *District Judge.*) *Ware-Kramer Tobacco Co.* v. *Am. Tobacco Co.*, 178 Fed. 117, 121 (C. C.—E. D. North Carolina, 1910), quoting from *Sessions* v. *Johnson*, 95 U. S. 347.

"'The act of each of several joint wrongdoers is regarded as the act of all, and the acts of all in consummation of a common purpose, are regarded as the acts of each.'" (CONNER, *District Judge.*) *Ware-Kramer Tobacco Co.* v. *Amer. Tobacco Co.*, 178 Fed. 117, 121 (C. C.—E. D. North Carolina, 1910), quoting substantially from *Powell* v. *Thompson*, 80 Ala. 51, 56 (Ala. Supreme Court, 1885).

§ 401. One Defendant Itself a Combination.

"It is uniformly held that, in order to recover, the plaintiff must allege that the defendants have formed a conspiracy, or combination, in restraint of trade, or, if there be but one defendant whose acts are made the basis of the action, that it is of itself such a combination, within the purview of the act." (CONNOR, *District Judge.*) *Ware-Kramer Tobacco Co.* v. *Amer. Tobacco Co.*, 178 Fed. 117, 123. (C. C. —E. D. North Carolina, 1910.)

§ 402. Corporation Cannot Escape Because Sole Defendant.

A corporation which has been a member of an unlawful combination cannot escape because it is the sole defendant. If the agreement between such corporation and its associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination, and has no ground to complain that it alone has been sued. *City of Atlanta* v. *Chattanooga, F. & P. Works,* 127 Fed. 23, 26. (C. C. A. Sixth Circuit, 1903).

§ 403. Single Defendant Under Section Two.

Under the Second Section, it is clear that by the word person is designated a corporation as well as an individual, and that one person or one corporation may be liable for monopolizing or attempting to monopolize, and may be sued as sole offender. *U. S.* v. *MacAndrews & Forbes Co.,* 149 Fed. 823, 836 (C. C.—S. D. New York, 1906); *U. S.* v. *Standard Oil Co.,* 173 Fed. 177, 195 (C. C.—E. D. Missouri, E. D. 1909); *Standard Oil Co.* v. *U. S.,* 221 U. S. 1, 61 (1911).

§ 404. Cases Against Single Defendant.

For cases brought under section seven of the Sherman Law against a single defendant, among others, see *Cilley* v. *United Shoe Machinery Co.,* 202 Fed. 598 (D. C. Mass. 1913); *Meeker* v. *Lehigh Valley R. Co.,* 183 Fed. 548 (C. C. A. Second Circuit, 1910); *Wheeler-Stenzel Co.* v. *Nat'l Window Glass Jobbers Ass'n,* 152 Fed. 864. (C. C. A. Third Circuit, 1907.)

§ 405. Stockholder Cannot sue for Injuries Sustained by his Company.

Where a stockholder has received no injuries to his business or property, other than such as he may suffer in

common with all the other stockholders of his corporation by reason of injuries to its business or property in violation of the act, such stockholder has no individual right of action under the act conferred on him for the recovery of threefold damages for injuries by him sustained; any such asserted right on the part of the stockholder being inconsistent with the right of the corporation to maintain suit upon the same cause of action. *Ames* v. *Am. Tel. & Tel. Co.*, 166 Fed. 820, 822–824 (C. C. Mass. 1909); *Post* v. *Bucks Stove & Range Co.*, 200 Fed. 918, 919–920 (C. C. A. Eighth Circuit, 1912); *Corey* v. *Boston Ice Co.*, 207 Fed. 465, 466 (D. C. Mass., 1913); *Fleitman* v. *U. S. Gas Improvement Co.*, 211 Fed. 103, 104–105 (C. C. A. Second Circuit, 1914); *Loeb* v. *Eastman Kodak Co.*, 183 Fed. 704, 709–710. (C. C. A. Third Circuit, 1910.)

§ 406. Sovereign State Cannot be a Party.

A sovereign state cannot be made a party to an action at law brought under Section 7 of the Act. Upon principle and authority, such state is entitled to immunity from any investigation of its sovereign acts by the federal courts. *Am. Banana Co.* v. *United Fruit Co.*, 166 Fed. 261, 266 (C. C. A. Second Circuit, 1908); *Lowenstein* v. *Evans*, 69 Fed. 908, 911. (C. C. South Carolina, 1895.)

§ 407. Defendants Need not Necessarily be Engaged in Interstate Commerce.

It is not necessary that it should be shown that the defendants were themselves engaged in interstate commerce, where in fact they by an illegal combination prevented interstate transportation of the plaintiff's goods. *Loewe* v. *Lawlor*, 208 U. S. 274. 301 (1908).

§ 408. Not Essential that Plaintiff be Engaged in Interstate Commerce.

Where a plaintiff actually sustains injuries wholly within a state by reason of a combination or agreement in restraint of interstate trade, he may nevertheless recover damages notwithstanding he is not himself engaged in interstate commerce. The act gives a compensatory remedy to *any person* directly affected by the combination or alleged agreement. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397 (1906); *City of Atlanta* v. *Chattanooga F. & P. Works*, 127 Fed. 23, 27–28. (C. C. A. Sixth Circuit, 1903.)

Where, however, it appears that the only interstate activities of either the plaintiff or defendant concern manufacturing merely, no action can be maintained. "A corporation may have an operating manufactory, in every state of the union and yet not be engaged in interstate commerce." (COXE, *District Judge.*) *Dueber Watch Case Mfg. Co.* v. *Howard Watch Co.*, 55 Fed. 851, 853 (C. C.—S. D. New York, 1893); *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 12 (1895).

§ 409. Right of Receiver to Sue.

While a *mere* chancery receiver, having no title to the assets or to the claim sued upon, cannot maintain an action in the federal courts under section seven in a jurisdiction other than that in which he was appointed, still a receiver who is a true successor in title has the right to sue anywhere. *Strout* v. *United Shoe Mach. Co.*, 195 Fed. 313, 319 et seq. (D. C. Mass. 1912.)

§ 410. Section Seven Declaratory of Common-Law Right of Action.

"Section 7 of the federal act of 1890 is declaratory of a

common-law right which existed in favor of parties injured by wrongs enumerated in other sections of that act, and confers jurisdiction to seek a remedy, and with treble damages, in a federal tribunal. The character of the right of action is in no way changed, and still remains one in tort." (HAZEL, *District Judge.*) *Metcalf* v. *Am. School Furniture Co.*, 108 Fed. 909, 912 (C. C.—W. D. New York, 1901), and cases cited.

§ 411. Action not Penal but Remedial.

"The remedy is not given to the public" but to private persons. "It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action a penal action." (LURTON, *Circuit Judge.*) *City of Atlanta* v. *Chattanooga F. & P. Works*, 127 Fed. 23, 28–29 (C. C. A. Sixth Circuit, 1903); *City of Atlanta* v. *Chattanooga F. & P. Co.*, 101 Fed. 900, 904. (C. C.—E. D. Tennessee, S. D. 1900.)

Mr. Justice Holmes is apparently in accord. See same case in Supreme Ct., 203 U. S. 390, 397 (1906), citing *Huntington* v. *Attrill*, 146 U. S. 657, 668; *Brady* v. *Daly*, 175 U. S. 148, 155, 156. See also *Strout* v. *United Shoe Mach. Co.*, 195 Fed. 313, 317 (D. C. Mass. 1912); *Monarch Tobacco Works* v. *American Tobacco Co.*, 165 Fed. 774, 779. (C. C.—W. D. Kentucky, 1908.)

§ 412. Cause of Action Complete at Date of Suit.

The cause of action under section seven is tortious and

must be complete at the time the suit is brought. Until the wrong is done and the injury suffered, there is no cause of action under this section. Threatened wrong and apprehended loss are not within its provisions. The action cannot be maintained if the allegations of the plaintiff do not show at the time the action was begun that the defendant had done any act in violation of the Statute. *Locker* v. *American Tobacco Co.*, 197 Fed. 495, 496. (D. C.—S. D. New York, 1912.)

§ 413. Words of Statute.

"Under the act of July 2, 1890, it is not sufficient to frame the declaration in the words of the statute. The statute does not set forth the elements of the offenses which are forbidden; and, further, there may be contracts in restraint of trade between the states or with foreign countries, and attempts to monopolize such trade or commerce which are not within the statute. These circumstances made it imperative that the substance of the contracts in restraint of trade, or the substantial facts which constitute the attempt to monopolize, should be set forth in the declaration." (COLT, *Circuit Judge.*) *Cilley* v. *United Shoe Mach. Co.*, 152 Fed. 726, 728–729 (C. C. Mass. 1907); *Ware-Kramer Tobacco Co.*, v. *Amer. Tobacco Co.*, 178 Fed. 117, 123. (C. C.—E. D. North Carolina, 1910.)

§ 414. Action need not be Labelled.

Where the averments are such as to show unequivocally that the action is brought under section seven, it is unnecessary to label the action as having been so brought. *Strout* v. *United Shoe Machinery Co.*, 195 Fed. 313, 317. (D. C. Mass. 1912.)

§ 415. Satisfaction of Defendant.

It is not one of the functions of the court to compel a

plaintiff to state his case in the way most satisfactory to the defendant where a close scrutiny of the complaint discloses nothing obviously wrong. *Loewe* v. *Lawlor*, 142 Fed. 216, 217. (C. C. Connecticut, 1915.)

§ 416. Reasonable Certainty.

"In the pleading, plaintiff must declare the forbidden acts and consequent injuries in such clear and unambiguous language, and with such reasonable certainty, that the defendants and the court may be apprised of the alleged cause of action, that it may be known by the former how to answer and prepare for trial, and by the latter what is the nature of the issue, and, if it be one of fact, to control the character of the proofs offered at the trial, and to pronounce and enforce a judgment that will settle the rights involved in such issues." (RELLSTAB, *District Judge.*) *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.*, 196 Fed. 514, 517. (D. C. New Jersey, 1912.)

§ 417. Scope of Plaintiff's Allegations.

The plaintiff "is not required to allege more than is necessary to be proven, nor is he to be unduly limited in making his allegations of steps taken because at the time of making them he is not in possession of the specific data which at the trial he will find necessary to establish such step, unless such step or steps by the very framework of his pleadings are essential to his cause of action, and it is apparent that without more definite data the defendant will be prejudiced in his defense in meeting such allegations." (RELLSTAB, *District Judge.*) *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.*, 196 Fed. 514, 522. (D. C. New Jersey, 1912.)

The plaintiff is not to be unduly limited in the allegations of his declaration. "To insist that the plaintiff in-

sert in his declaration only such steps as would be sufficient to maintain his action would be to unduly limit and skeletonize his pleading, a course apt to prove embarrassing, if not disastrous, at the trial, where the range of evidence may be limited by the paucity of the allegations, and one which would be antagonistic to, rather than cooperative with the legislative purpose manifested in the Anti-trust Act." (RELLSTAB, DISTRICT JUDGE.) *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.*, 196 Fed. 514, 522. (D. C. New Jersey, 1912.)

§ 418. Vagueness and Uncertainty.

A declaration under the Sherman Law is insufficient where it is so uncertain, vague and indefinite that the defendant is unable to know of what it is accused and to properly prepare its defense, or where the court is unable to determine whether the alleged offenses are within the statute. *Cilley* v. *United Shoe Mach. Co.*, 152 Fed. 726, 728. (C. C. Mass. 1907.)

§ 419. Repression of Evil and Advancement of Remedy.

"The manifest tendency" of the federal courts is "to apply to the act the fundamental rule of construction which requires the court to so interpret the statute that they repress the evil and advance the remedy. The evil at which this statute is aimed is of national importance, and the remedies provided for its punishment and repression should not be restricted by technical and narrow rules of pleading. If the plaintiff in an intelligent way and by 'a connected story' sets forth his grievance, he should not be turned away from the court or his pleading so mutilated by striking out more or less essential averments, as to embarrass him and unduly limit the scope of his proof when he comes to trial." (CONNER, *District Judge.*)

Ware-Kramer Tobacco Co. v. *Am. Tobacco Co.*, 178 Fed. 117, 125. (C. C.—E. D. North Carolina, 1910.)

§ 420. Strict Technical Rules of Pleading.

"The strict technical rules of pleading, the enforcement of which so often delayed and frequently defeated justice, have been abrogated by modern codes, or rules of the court." (CONNER, *District Judge.*) *Ware-Kramer Tobacco Co.* v. *Am. Tobacco Co.*, 178 Fed. 117, 122. (C. C.—E. D. North Carolina, 1910.)

§ 421. Greater Liberality than at Common Law.

Greater liberality is permitted the pleader who founds his cause of action upon the Anti-Trust Act in the form of stating the several steps which in his judgment bring his cause of action within the purview of such act, than was permitted by rules governing pleadings at common law. *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.*, 196 Fed. 514, 521. (D. C. New Jersey, 1912.)

"To require the party injured by the conspiracy denounced by the Anti-Trust Act to set out his cause of complaint with that degree of nicety and precision in stating times, places, methods and persons, as is required in the ordinary common-law pleading would be to nullify the beneficent purpose of the statute. If the pleader sets out with reasonable certainty and definiteness, the causes which resulted in his injury, and connects the defendant therewith, and from such allegations the defendant is apprised of the character of the accusation, and it is not apparent that he will be prejudiced," it is sufficient. (RELLSTAB, *District Judge.*) *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.*, 196 Fed. 514, 522. (D. C. New Jersey, 1912.)

§ 422. Fullness and Particularity of an Indictment not Required.

It is not necessary in the pleading in a civil action to state the facts showing a right of action with all the fullness and particularity required in an indictment charging a criminal offense. All that is necessary is to follow the rules of civil pleadings generally followed in the jurisdiction where the suit is brought. *Monarch Tobacco Works* v. *Am. Tobacco Co.*, 165 Fed. 774, 779. (C. C.—W. D. Kentucky, 1908.)

Civil pleadings under the act are not to be read and construed as an indictment would have been read and construed a hundred years ago, but the allegations are to be taken to mean what a perusal thereof fairly conveys to a dispassionate reader by a fairly exact use of English speech. *Swift & Co.* v. *U. S.*, 196 U. S. 375, 395 (1905).

§ 423. New Problem in Pleading.

"The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the Statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be, so extensive in time and space, that something of the same impossibility applies to them." (*Mr. Justice* HOLMES.) *Swift & Co.* v. *U. S.*, 196 U. S. 375, 395–396 (1905); *Ware-Kramer Tobacco Co.* v. *Am. Tobacco Co.*, 178 Fed. 117, 122, 123. (C. C.—E. D. North Carolina, 1910.)

§ 424. Full History of Facts.

"In several of the reported cases, the complaint, dec-

laration, or petition is set out in full showing, that, in setting forth the first essential fact, the pleaders have given a full history of the conduct and course of business of the defendants and this has generally been sustained by the courts." (CONNOR, *District Judge.*) *Ware-Kramer Tobacco Co.* v. *Am. Tobacco Co.*, 178 Fed. 117, 124. (C. C.—E. D. North Carolina, 1910.)

§ 425. Essential Averments.

"The petition need only aver, and state facts to show, that the defendants have committed one or more of the offenses condemned by the first and second sections, that the plaintiff is a person injured within the meaning of the seventh section, and the amount of damages it sustained by such injury." (SHELBY, *Circuit Judge.*) *People's Tobacco Co.* v. *Am. Tobacco Co.*, 170 Fed. 396, 407–408. (C. C. A. Fifth Circuit, 1909.)

"The essential averments in a declaration under this section (Section 7) would appear to be (1) That the defendant has done one or more of the things forbidden by the first and second sections of the statute; (2) that by such action of the defendant the plaintiff has been injured in his business or property; and (3) that damages were sustained." (COLT, *Circuit Judge.*) *Cilley* v. *United Shoe Mach. Co.*, 202 Fed. 598, 599. (D. C. Mass. 1913.)

§ 426. Rice v. Standard Oil Company.

In the District of New Jersey, a motion was granted to strike out a declaration based upon a cause of action arising under section seven of the Sherman Law, the principal ground relied upon by the Court being that there was a confusion of distinct causes of action even though the facts were in connected narrative form. This case, however, is of doubtful authority in light of the fact that

it is largely based upon the dissenting opinion of Mr. Justice Holmes in *Northern Securities Co.* v. *United States*, 192 U. S. 197, and demands that a declaration under the law be drawn with the same certainty as a criminal indictment, and that later Mr. Justice Holmes appears in *United States* v. *Swift & Co.*, 196 U. S. 375, not to be in accord with these views. See *Rice* v. *Standard Oil Co.*, 134 Fed. 464, 465–468; (C. C. New Jersey, 1905); *U. S.* v. *Swift & Co.*, 196 U. S. 375, 395–396 (1905).

§ 427. Allegations of Facts Constituting Conspiracy.

A complaint for conspiracy setting out, "by way of inducement, the circumstances under which the injury complained of was committed, the conspiring together and common purpose of the defendants, the means used to accomplish their common purpose, the object to be attained, the overt acts of one or more of the defendants in pursuance of such common purpose," is sufficiently definite. (ORTON, *J.*) *Murray* v. *McGarigle*, 69 Wisc. 483, 489 (Supreme Court, Wisconsin, 1887); *Ware-Kramer Tobacco Co.* v. *Am. Tobacco Co.*, 178 Fed. 117, 122. (C. C.—E. D. North Carolina, 1910.)

§ 428. Steps of Conspiracy Constituting but one Cause of Action.

"As a conspiracy may be accomplished by any number or variety of steps, some of which may be in the form of contracts, others as combinations, if the contracts and the combinations referred to in the declaration are but steps in such conspiracy, and such conspiring has for its purpose the alleged monopoly, the whole constitute but one cause of action." (RELLSTAB, *District Judge.*) *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.*, 196 Fed. 514, 517, 518. (D. C. New Jersey, 1912.)

"The use of general terms in alleging the character of a series of such steps (comprising an alleged conspiracy), or some of the methods employed in performing or enforcing them, or the failure to give the names of the persons said to have figured in the furtherance and effectiveness of such conspiracy, does not necessarily condemn the pleading as irregular or defective." (RELLSTAB, *District Judge.*) *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.*, 196 Fed. 514, 520. (D. C. New Jersey, 1912.)

§ 429. Scheme or Combination as a Whole.

The thing forbidden or declared to be unlawful by the act may reside in averments setting out a scheme or combination as a whole within sections 1 and 2 of the Act, without a declaration so framed being void for duplicity or uncertainty. *Cilley* v. *United Shoe Machinery Co.*, 202 Fed. 598, 601 (D. C. Mass. 1913); *Strout* v. *United Shoe Machinery Co.*, 202 Fed. 602, 604. (D. C. Mass. 1913.)

§ 430. Examples of Plaintiff's Pleadings.

For examples of plaintiff's allegations under Section Seven held to be sufficient, see the following cases, in which the plaintiff's form of pleading is set out in full: *People's Tobacco Co.* v. *Am. Tobacco Co.* (C. C. A.), 170 Fed. 396; *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.* (D. C.), 196 Fed. 514; *Loewe* v. *Lawlor*, 208 U. S. 274.

§ 431. Pendency of Action in State Court.

"When suits are pending between the same parties for the same cause of action, and demanding the same form of relief in both the state and federal courts, which have concurrent jurisdiction in the same territory, and the

federal jurisdiction is based upon diversity of citizenship, a plea in abatement alleging the pendency of one will be futile as against the other." (PLATT, *District Judge.*) *D. E. Loewe & Co.* v. *Lawlor*, 130 Fed. 633 (C. C. Connecticut, 1904); *Robinson* v. *Suburban Brick Co.*, 127 Fed. 804, 807 (C. C. A. Fourth Circuit, 1904), and cases cited.

It is not true, however, that where diversity of citizenship is absent the reason for the above rule departs. A state court cannot in the trial of a case therein pending invoke section seven of the anti-trust act in behalf of the plaintiff, and under its authority assess treble damages. Therefore, such case cannot be pleaded *lis pendens* in a suit for the same cause of action brought by the same plaintiff in one of the federal district courts. "The same case is not depending in both courts." (PLATT, *District Judge.*) *D. E. Loewe & Co.* v. *Lawlor*, 130 Fed. 633, 634. (C. C. Connecticut, 1904.)

§ 432. General Appearance and Waiver.

A general appearance on the part of one of the defendants must be deemed a waiver of the objection of a misjoinder because the other defendants are not inhabitants of the district where the suit is brought. *Lowry* v. *Tile, Mantel & Grate Assn.*, 98 Fed. 817, 822. (C. C.—N. D. California, 1899.)

Where such defendant did not file his demurrer for the special and single purpose of objecting to the jurisdiction, but for the further purpose of attacking the merits of the case upon the facts stated in the complaint, the appearance of such defendant must be regarded as a general appearance, and he is therefore prevented from objecting that his co-defendants are improperly joined with him. *Lowry* v. *Tile, Mantel & Grate Assn.*, 98 Fed. 817, 823–824. (C. C.—N. D. California, 1899.)

§ 433. Withdrawal of Plea to File Demurrer.

"Allowing the defendant to withdraw its plea and file its demurrer" is "a matter which rested entirely in the sound discretion of the court. . . . If it appeared that the plaintiff had misconceived his rights, and that he has no cause of action, it would seem that the interests of the parties and the speedy administration of justice were alike furthered by permitting the question to be raised and decided at once, thereby saving costs and expense to the parties." (CROSS, *District Judge.*) *Loeb* v. *Eastman Kodak Co.*, 183 Fed. 704, 710. (C. C. A. Third Circuit, 1910.)

§ 434. Bill of Particulars.

Where the allegations though general, are reasonably definite and certain and are sufficient to apprise the defendant of the offense complained of, the defendant if he deems himself entitled to more specific information, may apply for a bill of particulars in regard thereto. *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.*, 196 Fed. 514, 522. (D. C. New Jersey, 1912.)

§ 435. Discretion of Lower Court.

"The refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial or a continuance, or to reinstate a cause which has been legally dismissed, cannot be questioned for error in this (Supreme) Court." (*Mr. Justice* CAMPBELL.) *Spencer* v. *Lapsley*, 20 How. 264, 267 (1857).

§ 436. Delayed Raising of Defense in Appellate Court.

It is manifest that where it is not urged until the case is in the Supreme Court that a defendant corporation was individually liable as being of itself an illegal combination, that such contention will not avail where it appears that

the case was tried and ruled upon in the court below solely on the ground of the co-operation of the two principal defendants in a scheme of monopoly and restraint of trade, and that a ruling was not there invoked as to the separate liability of either. *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 38–39.

§ 437. Allegations must show Damage.

If the pleadings in a suit under Section 7 do not contain allegations of acts which have injured the plaintiff, "it is unnecessary to consider them however much they may contravene the other provisions of the statute." (NOYES, *Circuit Judge.*) *Am. Banana Co.* v. *United Fruit Co.*, 166 Fed. 261, 263. (C. C. A. Second Circuit, 1908.)

§ 438. Exercise of Power Resulting in Injury.

The *power* under and pursuant to the combination to do the prohibited things is what brands the combination as illegal, not the actual exercise of that power, although when a plaintiff sues for damages he is required to show that the operation of such power resulted in injury to him. *O'Halloran* v. *Am. Sea Green Slate Co.*, 207 Fed. 187, 191. (D. C.—N. D. New York, 1913.)

§ 439. Injury Where Restraint is Incomplete.

"The act does not appear to require that the restraint of trade should be so complete as to amount to total destruction, . . . as injury to the business or property of the plaintiff might result although the objects of the illegal combination were only partially accomplished." (EVANS, *District Judge.*) *Monarch Tobacco Works* v. *Am. Tobacco Co.*, 165 Fed. 774, 781. (C. C.—W. D. Kentucky, 1908.)

§ 440. Injury Produced by Acts Tainted with Illegal Scheme.

An unlawful conspiracy and combination does not in-

jure a person under section 7, "unless something be done to render the conspiracy and combination effective; but whatever is done by those engaged in the scheme or plot with the motive and intent to carry out the unlawful purpose itself becomes tainted with the illegality of the scheme" and thereby comes within said section. (EVANS, *District Judge.*) *Monarch Tobacco Works* v. *Am. Tobacco Co.*, 165 Fed. 774, 780. (C. C.—W. D. Kentucky, 1908.)

§ 441. Something more than Mental Intention Required.

It seems that something more than a mere mental intention to engage in interstate commerce is required in order to charge a defendant with damages for preventing the carrying out of such intention. *Pa. Sugar Ref. Co.* v. *Am. Sugar Ref. Co.*, 166 Fed. 254, 260. (C. C. A. Second Circuit, 1908.)

"It will not be contended that section 7 of the statute gives a cause of action to any person against another person who had merely planned to commit or unsucessfully attempted to commit the prohibited acts. The illegal contract or attempted monopoly must have resulted in an injury of some sort" to the plaintiff. (SHIPMAN, *Circuit Judge*, Concurring Opinion.) *Dueber Watch Case Mfg. Co.* v. *Howard Watch Co.*, 66 Fed. 637, 646. (C. C. A. Second Circuit, 1895.

§ 442. General Allegation of Damage is Sufficient.

Where a contract or combination in restraint of trade and commerce among the states has been sufficiently charged, the requirements of law are met by a general statement of damage to the plaintiff by reason thereof. *Wheeler-Stenzel Co.* v. *Nat'l Window Glass J. Assn.*, 152 Fed. 864, 874–875 (C. C. A. Third Circuit, 1907); *Mon-*

arch Tobacco Works v. *Am. Tobacco Co.*, 165 Fed. 774, 782. (C. C.—W. D. Kentucky, 1908.)

§ 443. Proximate and Continuing Damages.

The plaintiff may recover all damages which are the proximate and natural result of the acts complained of, including such damages as may have continued or resulted therefrom after the commencement of the suit. *Lawlor* v. *Loewe*, 209 Fed. 721, 729. (C. C. A. Second Circuit, 1913.)

"Damages accruing since the action begun were allowed, but only such as were the consequence of acts done before and constituting part of the cause of action declared on." *Mr Justice* HOLMES.) *Lawlor* v. *Loewe*, 235 U. S. 522, 536 (1915).

§ 444. General Rule.

The general rule is that where the damages claimed are such as would usually or naturally accompany or follow or be included in the results of the injuries complained of, they may be stated in general terms. Other and further damages, however, can neither be proved or recovered unless expressly averred and shown. *Monarch Tobacco Works* v. *Am. Tobacco Co.*, 165 Fed. 774, 782. (C. C.—W. D. Kentucky, 1908.)

§ 445. Actual Damages only Recoverable.

"Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses form no

better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered." (SANBORN, *Circuit Judge.*) *Central Coal & Coke Co.* v. *Hartman*, 111 Fed. 96, 98. (C. C. A. Eighth Circuit, 1901.)

§ 446. Burden of Proof on Plaintiff.

The burden of proof is on the plaintiff to show some real and actual damage to his business or property. Unless he proves such damage by a preponderance of competent evidence, the verdict must be for the defendant. "The items of damage claimed must be established by proof of facts from which they may be rationally inferred with reasonable certainty by the jury." (HOLLAND, *District Judge.*) *Loder* v. *Jayne*, 142 Fed. 1010, 1019. (C. C.—E. D. Pennsylvania, 1906.)

§ 447. Reasonable Certainty.

"The damages which the law contemplates, and which the act of Congress provides for, must be reasonable damages ascertainable upon the evidence presented in the case. There must be facts, transactions, actual evidence of some material and pertinent character, relating to a business from which the jury can ascertain with reasonable certainty that damage has actually been worked to such business, before any verdict in damages can be returned, other than nominal damages." (MORROW, *Circuit Judge.*) *Lowry* v. *Tile, Mantel & Grate Assn.*, 106 Fed. 38, 46. (C. C.—N. D. California, 1900.)

"While the law puts the burden of proof upon the plaintiff and requires the proof of such facts as will enable the

jury to arrive at the amount of damage with reasonable certainty, it will not permit the defendants who are, through their wrongful acts, responsible for the plaintiff's injury, to carry this requirement beyond the measure of proof thus stated. He is required to prove his claim with reasonable certainty and no more." (HOLLAND, *District Judge.*) *Loder* v. *Jayne*, 142 Fed. 1010, 1020. (C. C.—E. D. Pennsylvania, 1906.)

§ 448. Speculative and Remote Damages.

"If the evidence in the case in the matter of damage to the business of the plaintiffs has not shown any real and substantial damage to their business by reason of the association, apart from conjecture or mere speculation, then they are not entitled to any substantial compensation, and no verdict in damages should be rendered in their favor, except in the sum of one dollar, or other trifling amount." (MORROW, *Circuit Judge.*) *Lowry* v. *Tile, Mantel & Grate Assn.*, 106 Fed. 38, 47. (C. C.—N. D. California, 1900.)

§ 449. Anticipated Profits of a Business.

"The anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that (except in case of an established business) the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss." (SANBORN, *Circuit Judge.*) *Central Coal & Coke Co.* v. *Hartman*, 111 Fed. 96, 98 (C. C. A. Eighth Circuit, 1901), and cases cited.

§ 450. Anticipated Profits of Established Business.

"One who seeks to recover for the loss of the anticipated

profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery." (SANBORN, *Circuit Judge.*) *Central Coal & Coke Co.* v. *Hartman*, 111 Fed. 96, 99 (C. C. A. Eighth Circuit, 1901), and cases cited.

"Proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business." (SANBORN, *Circuit Judge.*) *Central Coal & Coke Co.* v. *Hartman*, 111 Fed. 96, 99 (C. C. A. Eighth Circuit, 1901), and cases cited.

§ 451. Future Profits of New Business.

"He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced." (SANBORN, *Circuit Judge.*) *Central Coal & Coke Co.* v. *Hartman*, 111 Fed. 96, 99. (C. C. A. Eighth Circuit, 1901.)

§ 452. Preventing Birth of Business.

"Neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born, and preventing the birth of a commerce which does not exist." (PUTNAM, *Circuit Judge.*) *U. S.* v. *Patterson*, 59 Fed. 280, 283. (C. C. Mass. 1893.)

§ 453. Preventing Plaintiff from Engaging in Business.

"A contract to strangle a threatened competition by

preventing the construction of an immediately projected line of railway, which, if constructed, would naturally and substantially compete with an existing line for interstate traffic would be in violation of the Anti-Trust Law." (ADAMS, *Circuit Judge.*) *U. S.* v. *Union Pacific Railroad Co.*, 188 Fed. 102, 117 (C. C. Utah, 1911), citing *Interstate Com. Com.* v. *Philadelphia & R. Ry. Co.*, 123 Fed. 969, 972 (C. C.—S. D. New York, 1903); *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. 251, 253 (C. C. A. Second Circuit, 1908); *Penn. R. Co.* v. *Commonwealth*, 3 Sadler (Pa. Sup. Ct. Cases), 83, 91, 7 Atlantic, 374. See also *U. S.* v. *Patterson*, 59 Fed. 280, 283. (C. C. Mass. 1893.)

"Whether a combination was entered into before or after the plaintiff commenced to do business is . . . immaterial. The statute applies to continuing combinations. It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business." (NOYES, *Circuit Judge.*) *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. 251, 253. (C. C. A. Second Circuit, 1908.)

§ 454. Exclusion from Commencing Business.

"The defendants next contend that the complaint fails to state a cause of action, because it appears that the plaintiff was not engaged in business at the time of the conspiracy; that it had no established business to injure. But in the very recent case of *Thomsen* v. *Union Castle Mail Steamship Co.* (decided October, 1908), 166 Fed. 251, this court said: 'It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business.' A person has a legal right to engage in a lawful business. If he is unlawfully excluded from exercising this right, when he is prepared and intends to exercise it, he suffers an injury for which the law awards damages—he is 'injured' within the meaning of the federal statute.

He may be unable to prove substantial compensatory damages, but in stating the infringement of his legal rights he states a cause of action at least for nominal damages, and may perhaps so state it as to call for exemplary damages. *Scott* v. *Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632." (NOYES, *Circuit Judge.*) *Pa. Sugar Ref. Co.* v. *Am. Sugar Ref. Co.*, 166 Fed. 254, 260. (C. C. A. Second Circuit, 1908.)

§ 455. Exemplary Damages.

That threefold damages are recoverable under the act does not necessarily preclude the plaintiff from obtaining a verdict of punitive or exemplary damages in a proper case, and from being entitled to treble the amount of such damages, see *Pa. Sugar Ref. Co.* v. *Am. Sugar Ref. Co.*, 166 Fed. 254, 260. (C. C. A. Second Circuit, 1908.) Contra, *Strout* v. *United Shoe Machinery Co.*, 195 Fed. 313, 317 (D. C. Mass. 1912) citing cases which, however, do not appear to be in point.

The claim of a plaintiff to the recovery of punitive or vindictive damages under a declaration at law brought in a suit under section seven does not make such declaration bad for duplicity. *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours P. Co.*, 196 Fed. 514, 519. (D. C. New Jersey, 1912.)

§ 456. Intention and Preparedness to Engage in Business.

In order to state a cause of action under section 7 of the statute, it is not necessary to aver an injury to an existing business, the carrying on of which involves interstate commerce, "but it is necessary to state facts showing an intention and preparedness to engage in business." (NOYES, *Circuit Judge.*) *Am. Banana Co.* v. *United Fruit Co.*, 166 Fed. 261, 264. (C. C. A. Second Circuit, 1908.)

§ 457. Money Actually Expended in Building and Equipping Refinery.

Where a corporation spends large sums of money in building and equipping a sugar refinery to be operated by a new business prepared and ready to engage in interstate commerce, and is prevented from so engaging by a combination forbidden by the Act, the amount of money actually lost in the enterprise cannot be regarded as speculative and may be recovered as damages. *Penn. Sugar Refining Co.* v. *Am. Sugar Refining Co.*, 166 Fed. 254, 260. (C. C. A. Second Circuit, 1908).

§ 458. Injuries to Inter or Intrastate Business.

"The injury to his business, whether it be in its volume or profit, is the same whether that business be inter or intrastate—whether he buy to extend his plant, or to sell again in an interstate business. This excessive price is the expected and intended result of the unlawful combination to restrain interstate trade in that commodity. That such a plaintiff is entitled to recover the damages thus sustained in his business, whatever its character, would seem to be the plain purpose of the seventh section of the law of Congress." (LURTON, *Circuit Judge.*) *City of Atlanta* v. *Chattanooga F. & P. Works*, 127 Fed. 23, 27. (C. C. A. Sixth Circuit, 1903.)

§ 459. Damages Entirely Within State.

Congress through Section 7 gives right to recover damages entirely incurred within the boundaries of one state, by reason of a combination forbidden by the Act, even where the plaintiff is not engaged in interstate commerce. *City of Atlanta* v. *Chattanooga Foundry & Pipe Works*, 127 Fed. 23, 25, 27. (C. C. A. Sixth Circuit, 1903.)

"The damage complained of must almost or quite

always be damage in property, that is, in the money of the plaintiff, which is owned within the state. If Congress had power to make the acts which led to the damage illegal, it could authorize a recovery for the damage although the latter was suffered wholly within the boundaries of one State." (*Mr. Justice* HOLMES.) *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397 (1906).

§ 460. Necessity of Investing Additional Capital. Increased Cost of Doing Business.

It may be shown as an element of damages that it was necessary for a plaintiff to invest extra capital in his business because of the existence of the combination. *Loder* v. *Jayne*, 142 Fed. 1010, 1020. (C. C.—E. D. Pennsylvania, 1906.)

"If by reason of a combination in violation of the Sherman Act, he be made to conduct what business he does at a greater cost, though it be greater in volume, but by reason of the injury done him at a less percentage of return, and he can show this, he is entitled to collect it from those who have injured him." (HOLLAND, *District Judge.*) *Loder* v. *Jayne*, 142 Fed. 1010, 1022. (C. C.—E. D. Pennsylvania, 1906.)

§ 461. Enhanced Price of Commodities.

"If the effect of a combination to enhance the price of a commodity which is the subject of interstate commerce be to restrain such commerce, within the meaning of the law of Congress, by reason of its tendency to affect the volume of such trade, then the effect upon the business of one who has paid the enhanced price, in an interstate transaction, must be to correspondingly affect the volume or profit of that business. The difference between what

he was thus compelled to pay and the reasonable price of the commodity under natural competitive conditions would be an injury to that business directly resulting from such unlawful combination." (LURTON, *Circuit Judge.*) *City of Atlanta* v. *Chattanooga F. & P. Works*, 127 Fed. 23, 27. (C. C. A. Sixth Circuit, 1903.)

Anyone may be injured in his property if not in his business by being led to pay more than the worth of a commodity. "A person whose property is diminished by a payment of money wrongfully induced is injured in his property." (*Mr. Justice* HOLMES.) *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 396 et seq. (1906).

§ 462. Excess Cost of Commodities and Extra Clerk Hire.

Increased or excess cost of commodities and extra clerk hire, occasioned by the restraint of trade of the defendants may be shown as elements of damage. *Loder* v. *Jayne*, 142 Fed. 1010, 1019–20. (C. C.—E. D. Pennsylvania, 1906.)

Damages may be claimed arising out of additional labor required to be bestowed by a person upon his business by reason of an unlawful combination. *Loder* v. *Jayne*, 142 Fed. 1010, 1020. (C. C.—E. D. Pennsylvania, 1906.)

§ 463. Injury to Property.

"A man is injured in his property when his property is diminished. He would not be said to have suffered an injury to his property unless the harm fell upon some object more definite and less ideal than his total wealth. A trademark, or a trade-name, or a title is property, and is regarded as an object of injury in various ways." (*Mr. Justice* HOLMES.) *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 399 (1906).

§ 464. Effect of Rebates.

"If the plaintiffs were coerced into paying sums of money, in excess of reasonable rates, which were held for the very purpose of preventing that competition which the statute is designed to promote (such sums to be rebated only where plaintiff refrained from patronizing competitors), they were damaged, within the meaning of the statute, to the extent of the sums so paid." (NOYES, *Circuit Judge.*) *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. 251, 253. (C. C. A. Second Circuit, 1908.)

§ 465. Avoidable Injuries.

"The plaintiffs in an action of this kind are not permitted to claim damage to their business by reason of an association contrary to the statute, where it was within their own power, in the exercise of reasonable diligence, to avert any such damage, and to avoid any consequences of injury to their business; that is to say, a party claiming damages is bound, in the exercise of reasonable diligence, to safeguard himself against any avoidable consequence of the act of another as to which he claims a right to recover damages." (MORROW, *Circuit Judge.*) *Lowry* v. *Tile, Mantel & Grate Assn.*, 106 Fed. 38, 47. (C. C.—N. D. California, 1900.)

§ 466. Set-Off.

The action which Section seven authorizes must be a direct one, and the damages claimed thereunder cannot be set off in actions that have no direct connection with the alleged offenses resulting in the injuries from which said damages have been sustained. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 552 (1902).

§ 467. Attorney's Fee.

The amount of the attorney's fee is to be determined by the court and not by the jury. After rendition of the verdict, a reasonable attorney's fee for services rendered should be promptly claimed. After proof of such services, the trial court in the exercise of a reasonable discretion, will award the attorney reasonable compensation. *Montague* v. *Lowry*, 193 U. S. 38, 48 (1904); *Clabaugh* v. *So. Wholesale Grocers' Assn.*, 181 Fed. 706, 708. (C. C.—N. D. Alabama, S. D. 1910.)

If there is nothing to go to the jury for single damages, then the court has no jurisdiction to render any judgment for treble damages. The same is true as to the attorney's fee,—which similarly is merely an incident to a judgment for the plaintiff. Consequently if no judgment is obtained, no allowance for the attorney's fee can be made. *Clabaugh* v. *So. Wholesale Grocers Assn.*, 181 Fed. 706, 708. (C. C.—N. D. Alabama, S. D. 1910.)

§ 468. Direction of Verdict.

Where the jury are unable to agree, the court may in a proper case give them direct instructions to find for either party where warranted by material and uncontroverted facts. *Cravens* v. *Carter-Crume Co.*, 92 Fed. 479, 484 et seq. (C. C. A. Sixth Circuit, 1899.)

Note. This case was for enforcement of a contract; not under Section seven.

§ 469. Evidence of Conduct of Defendant after Destruction of Plaintiff's Business.

Where an "alleged conspiracy is a continuous transaction, the conduct of the alleged co-conspirators after" the date "when the plaintiff's business is said to have been destroyed, may throw light upon the question whether a

combination or conspiracy did exist before that date. No testimony should be excluded which is not clearly without the issues." (WARD, *Circuit Judge.*) *Buckeye Powder Co.* v. *Hazard Powder Co.*, 205 Fed. 827, 830. (D. C. Connecticut, 1913.)

§ 470. Stolen Papers may be Offered in Evidence.

"The fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered was not a valid objection to their admissibility." (*Mr. Justice* BROWN.) *Hale* v. *Henkel*, 201 U. S. 43, 72 (1906).

§ 471. Introduction of Newspapers.

"The introduction of newspapers, etc., was proper in large part to show publicity in places and directions where the facts were likely to be brought home to the defendants, and also to prove an intended and detrimental consequence of the principal acts not to speak of other grounds." (*Mr. Justice* HOLMES.) *Lawlor* v. *Loewe*, 235 U. S. 522, 536 (1915).

§ 472. Reasons for Termination of Custom.

"The reason given by customers for ceasing to deal with sellers of Loewe hats, including letters from dealers to Loewe & Co. were admissible." (*Mr. Justice* HOLMES.) *Lawlor* v. *Loewe*, 235 U. S. 522, 536 (1915).

§ 473. Use in Evidence of Final Judgment or Decree Rendered in Government Proceedings.

A final judgment or decree rendered subsequent to October 15, 1914, in any criminal prosecution or in any suit or proceeding in equity brought by or in behalf of the United States under the anti-trust laws to the effect that

a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto, excepting such judgment or decrees entered by consent before any testimony has been taken after said October 15, 1914. *Act of October 15, 1914* (Clayton Act), Sect. 5.

CHAPTER XVI

THE SHERMAN ANTI-TRUST ACT AS A DEFENSE TO ACTIONS AT LAW OR IN EQUITY

§ 474. Sherman Law is Good Defense when Pertinent.

"Any one sued upon a contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action." (*Mr. Justice* PECKHAM.) *Bement* v. *Nat'l Harrow Co.*, 186 U. S. 70, 88 (1902).

§ 475. Enforcement of Unlawful Agreement.

"It is elementary law that the courts will not lend assistance in any way in carrying out an illegal agreement." (LURTON, *Circuit Judge.*) *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 148 Fed. 939, 948 (C. C. A. Sixth Circuit, 1906) citing *McMullen* v. *Hoffman*, 174 U. S. 639, 654; *Embrey* v. *Jemison*, 131 U. S. 336, 348.

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way toward carrying out the terms of an illegal contract." (*Mr. Justice* PECKHAM.) *McMullen* v. *Hoffman*, 174 U. S. 639, 654 (1899); *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 549 (1902); *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 263 (1909).

Where a plaintiff entrusts his property to the hands of his confederates for the purpose of employing the same in the furtherance of offenses forbidden by the Act, he is not permitted to invoke the assistance of a court of equity

to compel a division of the spoils, or a restoration or accounting of his property so invested. *American Biscuit Co.* v. *Klotz*, 44 Fed. 721, 725–726. (C. C.—E. D. Louisiana, 1891.)

§ 476. Parties in Pari Delicto.

"When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court at law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract." (*Mr. Justice* GRAY.) *St. Louis, etc., Ry. Co.* v. *Terre Haute, etc., Ry. Co.*, 145 U. S. 393, 407 (1892); *Harriman* v. *No. Securities Co.*, 197 U. S. 244, 296 (1905).

§ 477. Executed and Executory Contracts.

"Neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief will not be granted, unless the contract remains executory or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant." (*Mr. Justice* GRAY.) *St. Louis, etc., Ry. Co.* v. *Terre Haute, etc., Ry. Co.*, 145 U. S. 393, 407 (1892); *Harriman* v. *No. Securities Co.*, 197 U. S. 244, 296 (1905).

§ 478. Appointment of Receiver.

"The court ought not, by the appointment of a receiver, to aid complainant to perfect, and perhaps to enlarge, his combination or trust." (*Per Curiam.*) *American Biscuit*

Co. v. *Klotz*, 44 Fed. 721, 726. (C. C.—E. D. Louisiana, 1891.)

§ 479. Inevitable Tendency to Injure.

Where "the clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on the ground of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public." (TAFT, *Circuit Judge.*) *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 289 (C. C. A. Sixth Circuit, 1898), quoting from *Salt Co.* v. *Guthrie*, 35 Ohio St. 666.

§ 480. Enforcement of Rebate Agreement.

No cause of action can be predicated upon one of a number of written agreements providing that for the purpose of securing the continuous patronage of the purchaser of certain liquid compounds from the manufacturer thereof, such manufacturer will at the end of six months give a rebate of seven cents per gallon for all compounds so purchased provided such purchaser during said period shall have bought such kind of goods exclusively from said manufacturer, where such agreements were designed to carry out and secure the purpose of an illegal monopoly. *Dennehy* v. *M'Nulta*, 86 Fed. 825, 826–828. (C. C. A. Seventh Circuit, 1898.)

§ 481. Essential Part of Illegal Scheme.

A federal court will not lend its aid to the enforcement

of a contract for the sale of goods which is based upon agreements that are essential parts of an illegal scheme forbidden by the Act. *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 262 (1909).

§ 482. Protection of Conspiracy to Fix Rates.

A railroad complainant cannot "conspire unlawfully to fix rates, and then come into a court of equity and invoke its aid to protect those rates which are represented by the ticket presented to the court, and which is wrongfully used by the defendants." (HAZEL, *District Judge.*) *Delaware, L. & W. R. Co.* v. *Frank*, 110 Fed. 659, 696. (C. C.—W. D. New York, 1901.)

§ 483. Common Law Contracts in Restraint of Trade not Prohibited but Unenforceable.

"The common law does not prohibit the making of agreements constituting such combinations. It merely declines, after they have been made, to recognize their validity by refusing to make any decree or order which will in any way give aid to the purposes of such combinations." (BAKER, *District Judge.*) *National Harrow Co.* v. *Quick*, 67 Fed. 130, 132. (C. C. Indiana, 1895.)

§ 484. General Iniquitous Conduct.

"The maxim that he who comes into equity must come with clean hands has its limitations. It does not apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct, unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought."

(HAZEL, *District Judge.*) *Delaware, L. & W. R. Co.* v. *Frank*, 110 Fed. 659, 696 (C. C.—W. D. New York, 1901), quoting from *Insurance Co.* v. *Clunie*, 88 Fed. 170.

"In suits at law, it is doubtless true, as a general proposition, that a wrongdoer will not be permitted to dispute the legal title of one in possession of money or property by showing that the title thereto was unlawfully acquired, or that the owner intends to apply it to an unlawful use. I have strong doubts whether this rule ought to apply to a suit in equity, where nothing but clean hands and a good conscience will move the court to act. The combination represented by the complainant is not illegal in any other sense, except that the law will not lend its aid to the accomplishment of its purposes." (BAKER, *District Judge.*) *National Harrow Co.* v. *Quick*, 67 Fed. 130, 132. (C. C. Indiana, 1895.)

"The fact that one party to a contract is engaged in illegal acts will not, at common law, avail the other party as a defense to the enforcement of a contract in itself legal." (KOHLSAAT, *District Judge.*) *Union Sewer Pipe Co.* v. *Connelly*, 99 Fed. 354. (C. C.—N. D. Illinois, N. D. 1900.)

§ 485. Test is Whether Illegality is Involved.

"The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If he cannot open his case, without showing that he has broken the law, a court will not assist him. But if he does not claim through the medium of the illegal transaction, but upon a new contract bottomed on independent consideration, he may recover." (LACOMBE, *Circuit Judge.*) *The Charles E. Wiswall*, 86 Fed. 671, 674. (C. C. A. Second Circuit, 1898.)

§ 486. Contract not Tainted with Illegality.

"The principle is well recognized by the authorities that a promise remotely connected with an illegal act, and founded on a new consideration, is not tainted with the illegality, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act." (LACOMBE, *Circuit Judge.*) *The Charles E. Wiswall*, 86 Fed. 671, 674. (C. C. A. Second Circuit, 1898.)

"The defendant's proposition is that a person who has given work, labor, and services to another, upon that other's employment, may not recover their fair and reasonable value if, during the time that he rendered such services, he had been engaged with other men in like employment with himself in a combination to charge for such services as any of them might render according to some scale agreed upon by them. We know of no principle of law which calls for the adoption of such a rule, and are referred to no authorities which support it." (LACOMBE, *Circuit Judge.*) *The Charles E. Wiswall*, 86 Fed. 671, 673 (C. C. A Second Circuit, 1898.)

"One who voluntarily and knowingly deals with the parties so combined (into an illegal combination) cannot, on the one hand take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination was illegal, or that its prices were unreasonable." (SEAMAN, *District Judge.*) *Dennehy* v. *M'Nulta*, 86 Fed. 825. (C. C. A. Seventh Circuit, 1898.)

Where the proof shows conclusively that during the summer of 1895, certain tugs mentioned in the libel rendered services to the claimant's dredge in sums aggregating several hundred dollars, the claimant cannot avoid payment for such services thus requested and accepted

by him, upon the ground that the tug owners were members of an association which was illegal and void under the Sherman Law. "He should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services, and accepted the benefit thereof, he should pay." (COXE, *District Judge.*) *The Charles E. Wiswall*, 74 Fed. 802 (D. C.—N. D. New York, 1896); *The Charles Wiswall*, 86 Fed. 671, 672–673. (C. C. A. Second Circuit, 1898.)

§ 487. Patent and Trade-Mark Suits.

Unless something prohibited by the Act is directly involved as a necessary part of the cause of action brought for infringement of a patent or a trade-mark, the mere fact that the plaintiff is operating in restraint of trade or is a monopoly forbidden by the Act is no defense. *Nat'l Harrow Co.* v. *Hench*, 84 Fed. 226, 227–228 (C. C.—N. D. New York, 1898); *National Folding Box & P. Co.* v. *Robertson*, 99 Fed. 985 (C. C. Connecticut, 1901); *Otis Elevator Co.* v. *Geiger*, 107 Fed. 131, 133–134 (C. C. Kentucky, 1901); *Gen. Elec. Co.* v. *Wise*, 119 Fed. 922, 924 (C. C.—N. D. New York, 1903); *N. W. Consol. Mill. Co.* v. *Callam & Son*, 177 Fed. 786, 788 (C. C.—E. D. Michigan, N. D., 1910); *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 546 (1902).

§ 488. As a General Rule, Defense of Act must be Specially Pleaded.

In order that a defendant may avail himself of the fact that the contract declared on is in violation of the Sherman Law, he should ordinarily specially plead this statute in defense. *N. Y. Bank Note Co.* v. *Kidder Press Mfg. Co.*, 192 Mass. 391, 404. (Mass. Supreme Court, 1906.)

Should, however, such illegality appear as a matter of

law from the pleadings, the face of the contract in suit, or from the confessed facts in the case, the failure of the defendant to plead properly does not waive the objection, and the suit may nevertheless be dismissed by the court, the underlying principle being that the law will not lend its support to a claim founded upon its violation, and that the defense is allowed not for the sake of the defendant, but of the law itself. *Carter-Crume Co.* v. *Peurrung*, 86 Fed. 439, 440–441. (C. C. A. Sixth Circuit, 1898.)

§ 489. Lateness of Presentation of Defense.

A writ of error from the Supreme Court of the United States to the highest court of a state was properly allowed where it appears that the Federal question was raised and necessarily decided by such state court. If the state court passes on the question it is sufficient, the matter of lateness of presentation being solely one for the state court to decide under local procedure. *Cincinnati Packet Co.* v. *Bay*, 220 U. S. 179, 182 (1906).

CHAPTER XVII

PATENTS, COPYRIGHTS, TRADE-MARKS AND TRADE SECRETS

§ 490. Patent Franchise Includes Merely Right to Exclude.

"The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented without the permission of the patentee. This is all that he obtains by the patent." (*Mr. Chief Justice* TANEY.) *Bloomer* v. *McQuewan* (1852), 14 Howard, 539, 549 (1852).

§ 491. Three Exclusive Rights Embraced.

The monopoly conferred by a patent includes the right to exclude others from *making*, the right to exclude others from *selling* and the right to exclude others from *using* the invention covered by the patent; and these are separable and substantial rights. *Henry* v. *Dick Co.*, 224 U. S. 1, 27–28 (1911).

§ 492. Dual Nature of Exclusive Rights of Patentee.

The rights of an inventor are dual in character. "A patent does not confer even the right to use an invention. The inventor had that right before. It is merely an incorporeal right to exclude others from using the invention throughout the United States conferred by the government upon compliance with certain requirements, and is transferable only according to the laws of its creation, which the state statutes cannot effect."

(WHEELER, *District Judge.*) *Jewett* v. *Atwood Suspender Co.*, 100 Fed. 647, 648. (C. C.—Vermont, 1900.)

§ 493. Patentee has no Affirmative Right Under a Patent to Make, Use and Sell.

"The right to make, use and sell an invented article is not derived from the patent law. This right existed before and without the passage of the law and was always the right of an inventor. The act secured to the inventor the *exclusive* right to make, use and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee." (*Mr. Justice* DAY.) *Bauer* v. *O'Donnell*, 229 U. S. 1, 10 (1912); *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 425 (1908).

"By the terms of the patent he (the patentee) has the exclusive right to make, use and vend. The right to make, use and vend he has without the grant of Letters Patent. When we say that a patent grants an 'exclusive right,' we do not mean that the right to make, use and vend is granted, but only that the patented, existing right is made exclusive by the grant." (BROWN, *District Judge.*) *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 558. (C. C. Mass. 1909).

§ 494. Purpose and Scope of Patent Statute.

The patent statute "was passed for the purpose of encouraging and promoting useful inventions and improvements by the protection and stimulation thereby given to inventive genius, and was intended to secure to the public after the lapse of the exclusive privileges granted, the benefit of such inventions and improvements." While a liberal construction of the statute, however, is to be favored, "care should be taken not to extend by judicial

construction the rights and privileges which it was the purpose of Congress to bestow." (*Mr. Justice* DAY.) *Bauer* v. *O'Donnell*, 229 U. S. 1, 10 (1913).

§ 495. Use for Unlawful Purpose not Authorized.

"The conclusion drawn from the examination of these cases is that the patent laws give the patentee a monopoly in his invention, and afford him protection in its proper and legitimate employment; but that they do not authorize him to employ it for a purpose or in a manner that may be forbidden to all other persons in the use of their unpatented property or discoveries." (WALES, J.) *State* v. *Delaware etc. Co.*, 47 Fed. 633, 636. (C. C. Delaware, 1891.)

§ 496. No Right Given to Sell Indulgences.

"A patent is a grant of a right to exclude all others from making, using and selling the invention covered by it. It does not give a right to the patentee to sell indulgences to violate the law of the land, be it the Sherman Act or another." (ROSE, *District Judge.*) *U. S.* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172, 190. (C. C. Maryland, 1911.)

§ 497. Patents do not Confer License Against Prohibition of Law.

"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained." (*Mr. Justice* MCKENNA.) *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 49. Quoted with approval in *Straus* v. *Am. Publishers' Ass'n*, 231 U. S. 222, 234 (1913.)

§ 498. Patent Cannot Extend Power and Create Further Monopolies.

The provisions of the Sherman Act have no further operation in respect to a patentee than to prevent him from extending his power to the creation of other and further restraints or monopolies prohibited by the Act. Such monopolies cannot be said to be necessarily incident to the full exercise of the right secured by the patent. *Opinion of Justices of Massachusetts Supreme Court regarding the Proposed Machinery Bill of 1907.* Vol. 193, Mass. 605, 610.

§ 499. Sherman Law Discloses no Intent to Exempt Patentees.

"No word or phrase in the Sherman anti-trust act reveals an intent to exempt the owners of patents from its sweeping provisions against monopolistic combination. We are unable to perceive any underlying reason for supposing that by implication growing out of economic or business conditions such an exemption was intended. There appears to be no inherent natural distinction between owners of patents and owners of oil which would justify the application of the statute to one and not to the other. The conclusion seems to follow that the comprehensive condemnation of the act against every person who monopolizes interstate commerce by combination with others includes holders of patents as well as others." (RUGG, *Chief Justice.*) *United Shoe Machinery Co.* v. *La Chapelle,* 212 Mass. 467, 482–483. (Mass. Supreme Court, 1912.)

§ 500. Patentee may not Restrain Trade Outside of Patent.

"A patentee who monopolizes his invention breaks no law. He who uses his property right to exclude others from

the making, selling, or using his invention, for the purpose and with the effect of making a combination to restrain trade in something from which his patent gives him no right to exclude others, does break the law. He breaks it precisely as the individual defendants in the Standard Oil and American Tobacco Companies broke it." (ROSE, *District Judge.*) *U. S.* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172, 190. (C. C. Maryland, 1911.)

§ 501. Patentee in Spite of Sherman Law may Monopolize Thing Invented.

"The patentee may, in spite of that law, monopolize for the term of his patent the thing which he or his assignee invented. Neither at common law nor in this country by statute has he ever had a right to monopolize anything else. As to everything not validly claimed in his patent, he is as other men. If by the common law or the statutes of the state or by the enactments of Congress men are forbidden to restrain trade or to monopolize it, a patentee may not restrain trade or attempt to monopolize it in anything except that which is covered by his patent." (ROSE, *District Judge.*) *U. S.* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172, 190. (C. C. Maryland, 1911.)

§ 502. Limitation upon a Patentee's Contractual Power.

"We are not at all prepared to say that there are no limitations upon a patentee's power of contract with reference to the use of his invention by others. The property right of a patentee is, after all, but a property right, and subject, as is all other property to the general law of the land. We may also concede that contracts respecting the use of inventions and discoveries are, like all other contracts, subject to the limitations imposed by definite principles of public policy." (LURTON, *Circuit Judge.*)

Heaton-Peninsular Button Fastener Co. v. *Eureka Specialty Co.*, 77 Fed. 288, 292, 293 (C. C. A. 1896).

§ 503. Right to Exclude Exercised only by Infringement Suits.

The patentee's right to exclude others from making, using and selling his invention can be exercised in no other way than by bringing suits for infringement. The patentee has no sanction under the patent law to forcibly exclude infringers in any other way. *U. S.* v. *Patterson*, 205 Fed. 292, 297. (D. C.—S. D. Ohio, W. D. 1913.)

§ 504. States in Exercise of Police Powers, etc., may Prevent Sales of Patented Articles.

The sale of patented articles "may be prevented when the use of such articles may be subject, within the several states, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation." (*Mr. Justice* PECKHAM.) *Bement* v. *Nat'l Harrow Co.*, 186 U. S. 70, 90 (1902).

§ 505. Patent Rights in Channels of Commerce.

"There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I perhaps may, for a lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws which control commercial transactions." (BREWER, *J.*) *State of Missouri* v. *Bell Telephone Co.*, 23 Fed. 539, 540. (C. C.—E. D. Missouri, 1885.)

§ 506. Patented Articles not Outside of Act.

Patented articles are an important factor in interstate commerce and are subject to all restrictions imposed by law upon interstate traders. *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 559. (C. C. Mass. 1909.)

§ 507. Prohibited Monopoly of Patented Articles.

"It seems quite clear that an agreement in restraint of trade, though it relates to patented articles, may tend to create a monopoly which is different from that conferred by grants of letters patent." (BROWN, *District Judge.*) *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 562 (C. C. Mass. 1909); *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 48–49 (1912).

§ 508. Contra: No Prohibited Monopoly of Patented Articles.

"The Sherman Law contains no reference to the patent law. Each was passed under a separate and direct constitutional grant of power. . . . The necessary implication is that not one iota was taken away from the patent law, and that patented articles unless or until they are released from the dominion of monopoly, are not articles of trade or commerce among the several states." (BAKER, *Circuit Judge.*) *Rubber Tire Wheel Co.* v. *Milwaukee R. W. Co.*, 154 Fed. 358, 362. (C. C. A. Seventh Circuit, 1907.)

§ 509. Contract to Restrain Patentee's Own Trade.

"An agreement whereby a patentee agrees to restrain his own trade under his patent may be as much within the prohibition of the Sherman Act as any other agreement of the same character." (BROWN, *District Judge.*) *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 560. (C. C. Mass. 1909.)

§ 510. Patentee has no Right to Restrain Himself.

While a patentee by his patent is given the right to restrain or exclude others from his patent domain, he is given no right or privilege to restrain himself. *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 558. (C. C. Mass. 1909.)

§ 511. Contract of Non-Use Under Patent.

"Ownership of a patent involves no obligation to use nor does ownership of any other property. Non-use ordinarily violates no law; but contracting with another, putting it in the power of another to compel one not to use, is a contract in restraint of trade, designed for the purpose of suppressing competition." (BROWN, *District Judge.*) *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 560. (C. C. Mass. 1909.)

§ 512. Combination of Distinct Patent Owners Restraining Trade.

"Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade." (BUTLER, *District Judge.*) *National Harrow Co.* v. *Hench*, 83 Fed. 36, 38. (C. C. A. Third Circuit, 1897); *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 192 (C. C.—S. D. New York, 1905), and cases cited.

"The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does

not differ in this respect from any other." (BUTLER, *District Judge.*) *National Harrow Co.* v. *Hench*, 83 Fed. 36, 38. (C. C. A. Third Circuit, 1897.)

§ 513. Combination of Owners of Independent Patents.

"Combinations between owners of independent patents, whereby, as a part of a plan to monopolize the commercial field, competition is eliminated, are within the Sherman Act, for the reason that the restraint of trade or monopoly arises from combination and not from the exercise of rights granted by letters patent." (BROWN, *District Judge.*) *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 562. (C. C. Mass. 1909.)

"It is true that a patentee has the exclusive control of his invention during the life of the patent. He may practice the invention or not, as he sees fit, and he may grant to others licenses upon his own terms. But where, as was the case here, a large number of independent manufacturing concerns are engaged in making and selling, under different patents and in various forms, an extensively used article, competition between them is the natural and inevitable result, and thereby the public interest is promoted. Therefore, a combination between such manufacturers, which imposes a widespread restraint upon the trade, and destroys competition, is as injurious to the community, and as obnoxious to sound public policy, as if the confederates were dealing in unpatented articles." (ACHESON, *Circuit Judge.*) *National Harrow Co.* v. *Hench*, 76 Fed. 667, 669–670. (C. C.—E. D. Penn. 1896.)

§ 514. Contracts Creating such a Combination are Within Sherman Law.

"As by the terms of the contracts under consideration the owners of distinct patents each agreed to restrain its

own interstate trade, I am of the opinion that the contracts are in these particulars obnoxious to the Sherman Anti-Trust Act." (BROWN, *District Judge.*) *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 562. (C. C. Mass. 1909.)

§ 515. Agreements of Independent Patentees not to Compete.

"A contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefit of competition, and creates a restraint of trade which results, not from the granting of letters patent, but from agreement." (BROWN, *District Judge.*) *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 557. (C. C. Mass. 1909.)

§ 516. Combination Through Use of Exclusive License Contracts.

The cases involving the National Harrow Company indicate the extent to which the courts have been willing to go relative to combinations which have been formed under the cover of letters patent. This company was formed by various competing concerns, who were independent manufacturers of spring-toothed harrows, and each of whom was the owner of letters patent covering in whole or in part the particular product manufactured by it. Upon the assignment of all of said letters patent to the said National Harrow Company, its stock was thereupon distributed among said concerns, and an exclusive license was given to each restricted to its particular type of manufacture. Uniform terms and conditions were imposed in each of said licenses, and each manufacturer was bound to sell solely its said harrows at the prices and upon the

terms fixed at the will of the licensor. In a number of cases, it was held that an unlawful combination was thereby effected. *National Harrow Co.* v. *Hench*, 83 Fed. 36, 37–39 (C. C. A. Third Circuit, 1897) affirming *National Harrow Co.* v. *Hench*, 76 Fed. 667, 668, 670. (C. C.—E. D. Penn. 1896.) See also to same effect, *National Harrow Co.* v. *Quick*, 67 Fed. 130, 131–132 (C. C. Indiana, 1895); *National Harrow Co.* v. *Hench*, 84 Fed. 226, 227–228. (C. C.—N. D. New York, 1898.) For contra doctrine see *U. S. Consolidated S. R. Co.* v. *Griffin & Skelley Co.*, 126 Fed. 364 (C. C. A. Ninth Circuit, 1903); *Otis Elevator Co.* v. *Geiger*, 107 Fed. 131, 132–134. (C. C. Kentucky, 1901.)

"It will be perceived that the corporation through whose instrumentality the purposes of the combination are effected is simply clothed with the legal title to the assigned patents, while the several assignors are invested with the exclusive right to manufacture and sell their old style of harrows under their own patents; but all of them must sell at uniform prices and upon the same terms, without respect to cost or the merits of their respective styles of harrows, and all the members of the combination are strictly forbidden to manufacture or sell any other style or kind of float spring-tooth harrows than they are thus licensed to make and sell. Now, it is quite evident to me, as well by the papers themselves as from the testimony of witnesses, that this scheme was devised for the purpose of regulating and enhancing prices for float spring-tooth harrows, and controlling the manufacture thereof throughout the whole country, and that the combination especially by force of the numbers engaged therein tends to stifle all competition in an important branch of business." (ACHESON, *Circuit Judge.*) *National Harrow Co.* v. *Hench*, 76 Fed. 667, 669. (C. C.—E. D. Penn. 1896.)

§ 517. First Section Applies to Combination to Restrain Trade in Patented Articles.

"It seems to this court impossible to hold that this section (the first section) of the Act does not apply to a combination of patentees to restrain trade and commerce in patented articles made under their patents as much as to such a combination made by dealers in other articles of commerce." (RAY, *District Judge.*) *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 192. (C. C.—S. D. New York, 1905.)

§ 518. Combination of Non-Competing Patent Owners not Prohibited.

A corporation formed by the amalgamation of three non-competing companies each engaged in the manufacture and sale or lease of patented shoe machinery different in character and purpose from that manufactured by the others, is not a combination within the penalties of the Sherman Act. "On the face of it the combination was simply an effort after greater efficiency. . . . The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree." (*Mr. Justice* HOLMES.) *United States* v. *Winslow*, 227 U. S. 202, 215–217 (1913).

§ 519. Patents Constituting Single Mechanical Evolution.

Where certain patents as an entirety constitute a single mechanical evolution, and are in no sense competitive patents, the concentration of said patents under one control is in no sense a combination to prevent competition. (Condensed from Concurring Opinion of GROSSCUP, *Circuit Judge.*) *Indiana Mfg. Co.* v. *J. I. Case Threshing Machine Co.*, 154 Fed. 365, 372. (C. C. A. Seventh Circuit, 1907.)

§ 520. Multitude of Identical Agreements.

Apart from patents and copyrights, the reasons at common law which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might in no way affect the public interest, when a large number might. Where the general purpose of each separate contract is the regulation of prices and sales by one concern and the agreement of each covenantee is to sell only at the prices dictated by such concern, a general scheme of monopoly or restraint of trade is involved. *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 41. (C. C. A. Sixth Circuit, 1907.)

Even where the question of patent monopoly is involved, however, a system of uniform trade agreements based upon the use of a patented invention which transcends what is necessary to protect such monopoly, and which practically controls the output and dictates the prices from producer to consumer on nearly all sales of sanitary enameled iron-ware throughout the country is illegal and void. *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 47–48 (1912).

§ 521. Assignment an Integral Part of Scheme.

Where an assignment of letters patent is made in pursuance of an unlawful combination to enhance prices and prevent competition, and is an integral part of a scheme by the use of similar assignments to create a monopoly, the assignor in the last analysis retaining the right to make and sell under the patents so assigned, such assignment is invalid and the court will leave the parties thereto where it finds them, denying affirmative relief to one as against the other. *National Harrow Co.* v. *Hench*, 84 Fed. 226, 227–228. (C. C.—N. D. New York, 1898.) But see, *U. S. Con-*

solidated S. R. Co. v. *Griffin & Skelley Co.*, 126 Fed. 364 (C. C. A. Ninth Circuit, 1903), in which case, however, the court appears to misapprehend the scope of the decision in *Bement* v. *National Harrow Co.*, 186 U. S. 70, where the court expressly held that no question of *combination* in restraint of trade was involved.

§ 522. Patents Cannot Cover Violations of Law.

"Patents and patent rights cannot be made a cover for a violation of law. . . . But patents are not so used when the rights conferred upon them by law are only exercised." (*Mr. Justice* MCKENNA.) *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 32–33 (1913).

§ 523. Grant of Patent does not Sanction acts of Violence.

A grant of letters patent does not authorize or sanction acts of violence of the patentee in the protection of his patent right, acts of violence against the claimed infringing article, or the business of infringers. *U. S.* v. *Patterson*, 205 Fed. 292, 295. (D. C.—S. D. Ohio, W. D. 1913.)

§ 524. Patent does not Excuse Conspiracy to Restrain Trade.

The monopoly of one patentee cannot be extended and made more of a monopoly by that of another. The grant of an exclusive right to make and vend a certain machine does not include a license to combine and conspire with another, having a like exclusive right, to restrain trade and commerce or to conspire not to put the patented articles on the market. *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 191. (C. C.—S. D. New York, 1905.)

§ 525. Patentee Cannot Excuse or Cloak Monopolies Outside of Patent.

"The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by

several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges. The object of these privileges is to promote the public benefit, as well as to reward inventors. The suggestion that the contract is justified by the situation of the parties . . . their exposure to litigation . . . is entitled to no greater weight. Patentees may compose their differences as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage." (BUTLER, *District Judge.*) *National Harrow Co.* v. *Hench*, 83 Fed. 36, 38. (C. C. A. Third Circuit, 1897.)

"The monopoly secured to the patentee by the issuance of a patent cannot be designedly used to form a combination or conspiracy between manufacturers and dealers to accomplish a restraint of trade such as the Anti-Trust Act prohibits." (HAZEL, *District Judge.*) *U. S.* v. *New Departure Mfg. Co.*, 204 Fed. 107, 113. (D. C.—W. D. New York, 1913.)

§ 526. Monopoly Beyond Patent Term.

The exclusive rights granted under the patent laws are no justification of a monopoly relating to patented articles carried out by means of a combination of manufacturers to engross the market, control prices and prevent competition for a period of fifty years beyond the possible lifetime of any of the patents. *Strout* v. *National Harrow Co.*, 18 N. Y. Supp. 224, 233–234. (New York Supreme Court, 1892.)

§ 527. Added Element of Patent Cannot Excuse Combination Otherwise Prohibited.

Where a combination of manufacturers and jobbers is

condemned as in restraint of trade under the Act, the added element of a patent cannot confer immunity from a like condemnation. "Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights a universal license against positive prohibition." (*Mr. Justice* MCKENNA.) *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 49 (1912).

§ 528. Right of Contract Under Patents.

The individual right of contract is not affected by the grant of letters patent, whether rights arising under said letters patent are involved or not, the said right of contract being a matter within the scope of the general law rather than technical rules of patent law. *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 232 et seq. (1892); *State* v. *Bell Telephone Co.*, 23 Fed. 539, 540 (C. C.—E. D. Missouri, 1885); *State* v. *Delaware, etc., Tel. Co.*, 47 Fed. 633, 635 (C. C. Delaware, 1891); *Delaware, etc., Tel. Co.* v. *Postal Telegraph Co.*, 50 Fed. 677, 678 et seq. (C. C. A. Third Circuit, 1892, affirming 47 Fed. 633); *Heaton-Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. 288, 292–293 (C. C. A. Sixth Circuit, 1896); *Strait* v. *National Harrow Co.*, 18 N. Y. Supp. 224, 233–234. (New York Supreme Court, 1892.) *Opinion of the Justices*, 193 Mass. 605, 610–611. (Mass. Supreme Court, 1907.)

§ 529. Patentee's Right of Contract not Peculiarly Subject-Matter for Federal Court.

While the Federal Courts have exclusive jurisdiction of all cases arising under the patented laws, they have no jurisdiction by reason of subject-matter of cases arising out of contracts concerning patents. Thus, the Federal Courts have no jurisdiction of an action for specific performance of a license contract as to matters not involving

infringement of the patent. *Brown* v. *Shannon*, 20 How. 55, 56 et seq. (1857); *Hartell* v. *Tilghman*, 99 U. S. 547, 548 et seq. (1878); *Goodyear* v. *Union Rubber Co.*, 4 Blatchf. 63, 70 (C. C.—S. D. New York, 1857); *Burr* v. *Gregory*, 2 Paine, 426, 429. (C. C.)

Or, by reason of the subject-matter, of an action to recover royalties under a contract involving a license to make, use or sell under letters patent. *Albright* v. *Teas*, 106 U. S. 613, 616 et seq. (1892); *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46, 52 (1887); *Blanchard* v. *Sprague*, 1 Cliff. 288, 298–299. (C. C. Mass. 1859.)

Or, by reason of subject-matter, of a bill in equity to set aside an assignment of, or a license contract under, letters patent. *Wilson* v. *Sandford*, 10 How. 99, 101–102 (1850); *Merserole* v. *Union Paper Collar Co.*, 6 Blatchf. 356, 359. (C. C.—S. D. New York, 1869.)

§ 530. Right of Purchaser of Patented Article.

"The purchaser of an article made under a patent right may not duplicate it, but he may use the article purchased and sell the same as his own in any way or for any price he sees fit." (RAY, *District Judge.*) *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 188. (C. C.—S. D. New York, 1905.)

Where a patentee makes and vends an article incorporating the patented invention, "the purchaser can use the article in any part of the United States, and, unless restrained by contract with the patentee, can sell or dispose of the same." (*Mr. Justice* SHIRAS.) *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, 661 (1895).

§ 531. Patentee Cannot Control Future Price of Subsequent Sales.

There is not included within the exclusive right of a

patentee to "vend" his patented article, the right by notice, to dictate the price at which subsequent sales of the article may be made. Having once parted with the physical embodiment of his invention by passing title to a purchaser, the patentee has placed the article beyond the limit of the monopoly secured by the patent grant. *Bauer* v. *O'Donnell*, 229 U. S. 1, 16–17 (1913); *Adams* v. *Burke*, 17 Wall. 453, 455 (1873); *Kellogg Toasted Corn Flake Co.* v. *Buck*, 208 Fed. 383, 384 (D. C.—S. D. California, S. D. 1913); *Robert H. Ingersoll & Bro.* v. *McColl*, 204 Fed. 147, 148 et seq. (D. C. Minnesota, 3rd Div. 1913.)

§ 532. Where full Consideration has not been Paid.

Where the full consideration, however, has not been paid by the purchaser of a patented article, and the purchaser has only obtained a qualified title to such article by accepting the same with notice that it was to be used only with certain specified supplies therefor obtained from the patentee, the article is still within the limits of the patent monopoly, and a violation of said restriction by said purchaser or by a subsequent purchaser with notice would amount to infringement of the right of exclusive use conferred by the patent. *Henry* v. *Dick Co.*, 224 U. S. 1, 26–27 (1911); *Bauer* v. *O'Donnell*, 229 U. S. 1, 14 et seq. (1913).

But if the effect of such restriction is to substantially lessen competition or to tend to create a monopoly of interstate commerce, it is unlawful. *Act of October 15, 1914* (Clayton Act), Sect. 3.

§ 533. Reasonable and Legal Conditions not Prohibited.

Except as above stated, the Act clearly "does not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner

thereof, restricting the terms upon which the article may be used and the price to be demanded therefor." (*Mr. Justice* PECKHAM.) *Bement* v. *National Harrow Co.*, 186 U. S. 70, 92 (1902); *Henry* v. *Dick Co.*, 224 U. S. 1, 30 (1911).

§ 534. General Rule.

"The rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property (patented inventions), imposed by the patentee and agreed to by the licensee will be upheld by the courts. The fact that the conditions in the contracts uphold the patent monopoly or fix prices does not render them illegal." (*Mr. Justice* PECKHAM.) *Bement* v. *National Harrow Co.*, 186 U. S. 70, 91 (1902).

This general rule, however, must be now taken in connection with the third section of the Clayton Act providing: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

§ 535. Contract Coextensive with Patent Monopoly.

"It seems self-evident that a contract which is only coextensive with the monopoly conferred by letters patent, and which creates no additional restraint of trade or monopoly, does not conflict with the Sherman Act." (BROWN, *District Judge.*) *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 557. (C. C. Mass. 1909.)

§ 536. Restriction to Enhance Value of Patent.

Where as an incident to the sale of a patent, and for the purpose of securing the largest commercial return, the patentee covenants in effect not to engage in or be connected with a business competing therewith during the period or within the territory covered by such patent except in the event of the return of the purchase price, such restriction is not in unlawful restraint of trade and may be enforced. *American Brake Beam Co.* v. *Pungs*, 141 Fed. 923, 925–926. (C. C. A. Seventh Circuit, 1905.) In this connection see also Clayton Act, Sect. 3.

§ 537. Selling Price Restrictions.

"The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article." (*Mr. Justice* PECKHAM.) *Bement* v. *National Harrow Co.*, 186 U. S. 70, 93 (1902).

Subject, however, to the provisions of Section 3 of the Clayton Act, that competition is not to be substantially lessened or a tendency to create a monopoly of interstate trade brought about.

§ 538. Reasonable Restriction in License Contracts. Exclusive Use.

"There is nothing which violates the Act (Sherman Anti-

Trust Act) in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual who is the licensee, and is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article." (*Mr. Justice* PECKHAM.) *Bement* v. *National Harrow Co.*, 186 U. S. 70, 94 (1902).

§ 539. Maintenance of Prices and Restriction of Competition.

"The right of the owner of letters patent to assign rights to manufacture, use, and vend, upon condition that the assignee shall maintain certain prices, and to agree not to compete with his assignee or to license others to compete, is recognized" by the courts. (BROWN, *District Judge.*) *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 557. (C. C. Mass. 1909.)

But the effect of such condition must not be that prohibited by Section 3 of the Clayton Act.

§ 540. Restriction must not Violate some Law Outside of Patent Law.

Whatever the terms imposed by a patentee for the use of his invention the "courts will enforce them provided only that the licensee is not thereby required to violate some law outside of the patent law." (BAKER, *Circuit Judge.*) *Rubber Tire Wheel Co.* v. *Milwaukee R. W. Co.*, 154 Fed. 358, 362. (C. C. A. Seventh Circuit, 1907.)

§ 541. Restraints Cannot Disable Public Service Corporation in Performance of its Duties.

While patentees are under no obligation to license the use of their inventions to any public service corporation,

yet having done so they are not at liberty to place restraints upon such a public corporation which would disable it to discharge all the duties imposed upon companies engaged in the discharge of duties subject to regulation by law. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 91 (1902), and cases cited.

§ 542. Restriction to Prevent Infringement.

A restrictive provision in a license contract relating to harrows manufactured and sold by the defendant is valid under the Act where the plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under their patents, and it had no purpose to stifle competition in the harrow business more than the patent recited in the contract provided for, or to prevent the defendant from attempting to make any improvement in harrows. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 94 (1902).

§ 543. Settlement of Suits for Infringement.

It is a legitimate and desirable result in and of itself to settle and prevent in the future suits for infringement and for injunction based upon letters patent, particularly where there has been a large amount of patent litigation between the parties and the likelihood of further litigation in the future. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 93 (1902).

§ 544. General Rule that on Suits for Infringement, Sherman Anti-Trust Act is no Defense.

"The proposition that the plaintiff, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to

perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted." (*Mr. Justice* HARLAN.) *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 546 (1902).

Where in defense to a bill for infringement of patents, it is alleged that the title to said patents is clouded because of mesne assignments which are merely in furtherance of an illegal combination, such defense if maintainable should very explicitly and exactly show how the complainant is an unlawful association, giving all the necessary particulars, in order that the complainant can know precisely what it is to meet, and so that the court can determine whether all the rights of said complainant to protect its claim to said patents have been forfeited, ipso facto, by entering into such an association. *Otis Elevator Co.* v. *Geiger*, 107 Fed. 131, 134. (C. C. Kentucky, 1901.)

A corporation is not denied its right to sue for infringement upon a patent owned by it, because it has violated any of the provisions of the Sherman Anti-Trust Act. The grantee of a patent is not to be refused the protection of the patent statutes because he has committed an offense under some other branch of the law. *General Electric Co.* v. *Wise*, 119 Fed. 922, 924. (C. C.—N. D. New York, 1903.)

"The charge, if established, that the complainant is itself, or is a member of, a combination in violation of the federal anti-trust statute, is not a defense available in an action for the infringement of a patent." (NOYES, *Circuit Judge.*) *Motion Picture Patents Co.* v. *Laemmle*, 178 Fed. 104, 105 (C. C.—S. D. New York, 1910); *Motion Picture Patents Co.* v. *Eclair Film Co.*, 208 Fed. 416 (D. C. New Jersey, 1913); *National Folding-Box & P. Co.* v. *Robertson*, 99 Fed. 985, 987–989 (C. C. Connecticut, 1900), reviewing the cases.

§ 545. Violation of Act no Defense in Infringement of Trade-Mark.

"The Sherman Act has its own penalties for violation of its provisions. It contains nothing that sanctions the argument that an offender against it shall be deprived of redress for a civil injury on the plea that he has been guilty of an infraction of that act." Thus on a suit for infringement of a trade-mark, violations of the act have no relevancy. (SWAN, *District Judge.*) *N. W. Consol. Mill. Co.* v. *Callam & Son*, 177 Fed. 786, 788 (C. C.—E. D. Michigan, N. D. 1910); *Coco-Cola Co.* v. *Deacon Brown Bottling Co.*, 200 Fed. 105, 106. (D. C.—N. D. Alabama, S. D. 1912.)

§ 546. Doctrine that Defense may be Raised Where Illegal Agreement is Necessarily Involved.

Where it appears in a suit in equity brought for infringement of patents that a court cannot sustain the bill without giving aid to the unlawful combination represented by the complainant, it has been decided in a proper case that affirmative relief should be denied and the bill dismissed. (See Opinion of COXE, *District Judge.*) *National Harrow Co.* v. *Hench*, 84 Fed. 226, 227, 228 (C. C.—N. D. New York, 1898); *National Harrow Co.* v. *Quick*, 67 Fed. 130, 132. (C. C. Indiana, 1895.)

While the broad doctrine of these cases, however, would seem to be sound, its application to the general situation therein disclosed has not been generally followed, chiefly on the ground that merely because a complainant is an obnoxious corporation does not deprive it of the right to sue upon letters patent to which it has the legal title no matter how acquired, and that seeking to perpetuate the monopoly granted by letters patent cannot logically be said to be giving aid to an unlawful combination. *National*

Folding-Box & P. Co. v. *Robertson*, 99 Fed. 985, 987–989 (C. C. Connecticut, 1900), and cases cited.

But it would nevertheless appear, where the infringement complained of was of a contributing character and consisted in the violation of restrictions or conditions contained in one of a number of license contracts which were in furtherance of the purposes of any illegal combination forbidden by the law, that the bill for such infringement should properly be dismissed, for otherwise a decree for the complainant would necessarily involve the aid of the court in enforcing an illegal contract. For a case where license contracts under a patent were held to be illegal because within the prohibitions of the Act, see *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20 (1912).

§ 547. Enjoining of Bringing of Infringement Suits.

"The proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of, the patented article, if he believes the patent is being infringed; and the motive which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights." (WALLACE, *Circuit Judge.*) *Strait* v. *National Harrow Co.*, 51 Fed. 819, 820. (C. C.—N. D. New York, 1892.)

§ 548. Simultaneous Infringement Suits by Competitors.

In the absence of proof of co-operation of two concerns, each manufacturing and selling patented articles, to injure the business or property of a competitor, the simultaneous bringing of separate suits for infringement by said concerns upon their respective patents against said competitor has no sinister significance and does not necessarily establish concerted action. *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 31 et seq. (1912).

§ 549. Copyright Act does not Confer Right to Control Future Sales.

The copyright act in conferring the exclusive right to vend upon the proprietor of the copyright did not thereby confer upon said proprietor any further right to control the future sales of the copyrighted article after he had exercised the right to vend secured him by said Act. *Straus* v. *Am. Publishers' Assn.*, 231 U. S. 222, 234 (1913); *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 351 (1908).

§ 550. Where Purchaser is Absolute Owner.

"The purchaser of a copyrighted book may not publish or make or print a copy, as this would be an infringement of the copyright; but this restriction in no way interferes with the absolute ownership of the particular copy of the book." (RAY, *District Judge.*) *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 188 (C. C.—S. D. New York, 1905); *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 350 (1908).

§ 551. Proprietor of Copyright After Absolute Sale Cannot Restrict Alienation.

"Under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains has parted with all his title to the book, and has con-

ferred an absolute title to it upon a purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership in private property." (KNOWLTON, *J.*) *Garst* v. *Hall & Lyon Co.*, 179 Mass. 588, 591; *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 185 (C. C.—S. D. New York, 1905); *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 349–350 (1908).

§ 552. No Infringement of Copyright to Violate Price Restriction.

It is not an infringement of a copyright of a book for the owner of copies of the book to sell such copies at a price which violates a valid contract between the publisher of the book and the dealer, and which was made at the time such dealer became the owner. *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 182. (C. C.—S. D. New York, 1905.)

§ 553. Single Owner.

"A corporation, on becoming the owner of several patents or of several copyrights, may do all acts under each that the person to whom such rights were originally granted might have done. Having become the owner, it is entitled to the benefit and privileges of the monopolies granted." (RAY, *District Judge.*) *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 191. (C. C.—S. D. New York, 1905.)

§ 554. Purpose of Acquisition Immaterial.

"A person or a corporation may lawfully become the owner of any number of copyrights or of all the copyrights of books issued by the United States, and it is immaterial that the purpose is to monopolize the whole business of publishing and selling copyrighted books." (RAY, *District Judge.*) *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 190. (C. C.—S. D. New York, 1905.)

§ 555. Acquisition by Single Owner must not be mere Cover for Combination.

"One man cannot combine or conspire. It takes two or more to make a combination or conspiracy. So an agreement by all owners of copyrights to assign the same to one person or corporation is but a sale of their own. If the agreement be a mere pretense, however, a mere cover for a combination to violate some statute, then such agreements to sell would be void and the whole combination illegal and void." (RAY, *District Judge.*) *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 191. (C. C.—S. D. New York, 1905.)

§ 556. Copyright Statute Cannot Authorize Agreements or Combinations in Restraint of Trade.

"No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly in violation of the specific terms of the Sherman Law." (*Mr. Justice* DAY.) *Straus* v. *Am. Publishers' Assn.*, 231 U. S. 222, 234 (1913).

When all the publishers of copyrighted books and dealers therein combine to exact a fixed, arbitrary price, the readers of such books become powerless to escape from such exaction because of the new monopoly created by such combination in addition to the copyright monopoly, and the combination comes within the prohibitions of the Sherman Anti-Trust Act. *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 192. (C. C.—S. D. New York, 1905.)

Where by resolution, agreements, and other methods to the end that copyrighted books are sold to book-sellers who maintain the retail price thereof, and not to book-sellers who cut such prices, an association has prevented competition in the sale of such books throughout the several states, such restraint is within the denunciation of

the Sherman Act, and the copyright act cannot be invoked in justification thereof. *Straus* v. *Am. Publishers' Assn.*, 231 U. S. 222, 229 et seq. (1913).

§ 557. Contracts Relating to Secret Formulas.

There is a distinction between the statutory monopoly accorded to articles protected by a patent or a copyright and articles made under trade secrets or private medical formulas. Contracts regarding such articles are neither outside the prohibition of the Sherman Law or common law, or within the statutory protection accorded patents or copyrights. *Dr. Miles Medical Co.* v. *J. D. Park & Sons Co.*, 164 Fed. 803, 805–806 (C. C. A. Sixth Circuit, 1908); *Dr. Miles Medical Co.* v. *J. D. Park & Sons Co.*, 220 U. S. 373, 401–404 (1911).

§ 558. Covenant of Vendor not to Use Secret Process.

"Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value and the public has no interest in the question by whom it is used." (*Mr. Justice* GRAY.) *Central Trans. Co.* v. *Pullman Palace Car Co.*, 139 U. S. 24, 53 (1890).

§ 559. Articles made Under Secret Formulas not Exempt from Law.

A free right of alienation is an incident to the general right of property in articles which pass from hand to hand in the commerce of the world. There is no economic or legal reason to exempt articles made under a private formula from the rules against unlawful restraints of trade. *Dr. Miles Medical Co.* v. *J. D. Park & Sons Co.*, 164 Fed. 803, 806–7 (C. C. A. Sixth Circuit, 1908); *Dr. Miles Medical Co.* v. *J. D. Park & Sons Co.*, 220 U. S. 373, 404 (1911).

CHAPTER XVIII

WITNESSES: SUBPŒNA DUCES TECUM, IMMUNITY, CONTEMPT

§ 560. Subpœnas in General.

In any suit, action, or proceeding brought by or on behalf of the United States, subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the anti-trust laws may run into any other district: *Provided*, That in civil cases no writ of subpœna shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown. *Clayton Act* (Act of October 15, 1914), Sect. 13.

§ 561. Necessity of Application for Subpœna Duces Tecum.

Notwithstanding the contra practice in some of the state courts, a *subpœna duces tecum* will only issue out of a federal court in a civil cause upon proper application being made therefor and after order of the court thereon directing the clerk to issue the subpœna. *Dancel* v. *Goodyear Shoe Mach. Co.*, 128 Fed. 753, 756, 761–762 (C. C. Mass. 1904); *U. S.* v. *Terminal R. Assn.*, 154 Fed. 268, 270–271. (C. C.—E. D. Missouri, E. D. 1907.)

§ 562. Definiteness required.

The description must be specific enough to apprise the

witness of the particular documents and books called for, and not so general as to warrant the supposition that they are wanted merely for a "fishing expedition." *U. S.* v. *Terminal R. Assn.*, 154 Fed. 268–269. (C. C.—E. D. Missouri, E. D. 1907.)

§ 563. Persons Subject Thereto.

Such subpœna may be directed to a corporation, a party litigant, or other person. If the service of the subpœna fails or is likely to fail to obtain material evidence known to be in the possession of one of the parties to the suit, then a motion or petition to produce may be resorted to under Revised Statutes, Sect. 724. *Merchants Nat'l Bank* v. *State Nat'l Bank*, 3 Cliff. 201, 202 et seq. (C. C. Mass. 1868.) That a corporation may be subpœnaed duces teum, see *In re Am. Sugar Refining Co.*, 178 Fed. 109, 111. (C. C.—S. D. New York, 1910.)

§ 564. Reasonable Ground of Relevancy.

It does not devolve upon the applicant for a *subpœna duces tecum* to satisfy the court beyond any reasonable doubt that the books and papers called for therein are relevant and material. All that is required is that there should be shown to be a reasonable ground to believe that they may be relevant and material at the trial of the cause. *U. S.* v. *Terminal R. Assn. of St. Louis*, 148 Fed. 486, 489. (C. C.—E. D. Missouri, E. D. 1906.)

§ 565. Mere Statement that Documents are Material.

On an application for a *subpœna duces tecum*, it is insufficient for the mover to allege merely "that the documents desired are material and relevant to the issue in that cause"; the facts should be set out with sufficient fullness in order to enable the court to determine whether the documents to be produced are in fact at least prima facie

material and relevant to the issues of the cause. *U. S.* v. *Terminal R. Assn. et al.*, 154 Fed. 268, 269. (C. C.—E. D. Missouri, E. D. 1907.)

§ 566. Unreasonable Searches and Seizures.

It is "quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of the courts to compel, through a *subpœna duces tecum*, the production, upon a trial in court of documentary evidence." (*Mr. Justice* BROWN.) *Hale* v. *Henkel*, 201 U. S. 43, 73 (1906).

Where a witness is ordered to produce a single document or numerous documents in his possession, which were so adequately and particularly described as to enable him to find them for use in a pending action, civil or criminal, the *subpœna duces tecum* making such order is unobjectionable and is not an unreasonable search and seizure. *In re Hale*, 139 Fed. 496, 503. (C. C.—S. D. New York, 1905.)

But a *subpœna duces tecum* may be so broad and general in character as to be the equivalent of an unreasonable search and seizure within the constitutional provision. *In re Hale*, 139 Fed. 496, 503. (C. C.—S. D. New York, 1905.)

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (*Mr. Justice* BROWN.) *Hale* v. *Henkel*, 201 U. S. 43, 71 (1906).

An order for the production of books and papers may constitute an unreasonable search under the Fourth Amendment, where too sweeping in its terms. So a *subpœna duces tecum* not requiring the production of a single

contract, or of contracts with a particular corporation, or a limited number of documents, but *all* understandings, contracts, correspondence or reports between one company and several other companies is too broad, and "a general subpœna of this description is equally indefensible as a search warrant would be, couched in similar terms." (*Mr. Justice* BROWN.) *Hale* v. *Henkel*, 201 U. S. 43, 76–77 (1906).

§ 567. Claim of Immateriality by Witness.

"The claim of immateriality of the testimony cannot avail a witness against the orders of the court." (*Mr. Justice* MCKENNA.) *Nelson* v. *U. S.*, 201 U. S. 92, 114 (1906).

"It is not for the witness to say 'I will not produce these records and papers because I believe, or I am advised, that they would not be material if I produced them.' That would leave the determination of the whole matter with the witness himself and the court would be powerless." (FINKELNBURG, *District Judge.*) *U. S.* v. *Terminal R. Assn. of St. Louis*, 148 Fed. 486, 488. (C. C.—E. D. Missouri, E. D. 1907.)

§ 568. Books and Papers of a Private Nature.

That the papers and books called for are of a private or confidential nature is no excuse for their non-production. Requiring such matters to be brought into court in obedience to a *subpœna duces tecum* properly issued is not an unreasonable search and seizure in violation of the fourth amendment to the constitution of the United States. Private interest and convenience must yield to the exigencies of the case. *U. S.* v. *Terminal R. Assn. of St. Louis*, 148 Fed. 486, 489–490. (C. C.—E. D. Missouri, E. D. 1906.)

§ 569. Officers of a Corporation.

An officer of a defendant corporation, whose duty it is to have the physical custody and control of its documents, cannot excuse his disobedience of a *subpœna duces tecum* on the ground that the documents called for were in the possession and control of the corporation, and, therefore, were not shown to be in the possession or under the control of the witness. "A corporation can have possession of nothing except by the human beings who are its officers, and it is to them, not the intangible being they represent and act for, that the law directs its process of subpœna and must procure its evidence." (*Mr. Justice* MCKENNA.) *Nelson* v. *U. S.*, 201 U. S. 92, 115–116 (1906).

§ 570. Presence in Court of Witness or Documents.

A subpœna is not necessary where a witness is present in court or within the verge of the court. The only object of a subpœna is to secure his attendance. It is superfluous when he is present without having been subpœnaed. So the rule is the same as to the production of documents. *U. S.* v. *Armour & Co.*, 142 Fed. 808, 824 (D. C.—N. D. Illinois, 1906), and cases cited.

§ 571. Effect of Production of Books and Papers.

Books and documents prove themselves when produced for the purpose of showing admission against interest. They are receivable as evidence against the party producing them. No oath is essential to the compulsion to produce the documents in a witness' possession. Accordingly, books and papers produced by parties defendant as the books and records of their business, and called for as such, are evidence against them without any oath. *U. S.* v. *Armour & Co.*, 142 Fed. 808, 825 (D. C.—N. D. Illinois, 1906), and cases cited.

§ 572. Motion to Quash.

The sufficiency of a *subpœna duces tecum* after issuance may be raised on a motion to quash. *U. S.* v. *Terminal R. Assn.*, 154 Fed. 268. (C. C.—E. D. Missouri, E. D. 1907.)

§ 573. General Power of Equity Court.

"It is well settled that a court of equity has power to compel the production of books and papers in virtue of its inherent and general jurisdiction, and this power is not confined to the parties in the suit, but extends to third persons." (FINKELNBURG, *District Judge.*) *U. S.* v. *Terminal R. Assn. of St. Louis*, 148 Fed. 486, 488. (C. C.—E. D. Missouri, E. D. 1906.)

§ 574. Incrimination of Witness.

"It is a rule of the common law that a witness will not be compelled to answer any question, the reply to which would supply evidence by which he could be convicted of a criminal offense. This doctrine was firmly implanted in the common law of Great Britain and of the colonies long before the adoption of the constitution of the United States. The principle is held so sacred in this country that it is embodied in the respective constitutions of all the states, as well as in the federal constitution. The principle, as applied to this case, is found in the fifth amendment to the constitution: 'No person shall be compelled in any criminal case to be a witness against himself.'" (SHELBY, *Circuit Judge.*) *Foot* v. *Buchanan*, 113 Fed. 156, 158. (C. C.—N. D. Mississippi, W. D. 1902.)

"It is true that the witness cannot avoid answering questions upon his mere statement that his answers to them will tend to criminate him. It is for the judge to decide whether his answer will reasonably have such tendency, or whether it will furnish an element or link in the

chain of evidence necessary to convict him." (SHELBY, *Circuit Judge.*) *Foot* v. *Buchanan*, 113 Fed. 156, 160. (C. C.—N. D. Mississippi, W. D. 1902.)

§ 575. Immunity Statute.

Except for perjury, no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution brought by the government under the Sherman Law or Interstate Commerce Act. *Act of February 25, 1903* (32 Stat. 854, 903.)

This immunity shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath. *Act of June 30, 1906.* (43 Stat. 798.)

§ 576. Status of Immunity Law Prior to June 30, 1906.

It seems that prior to June 30, 1906, in order to claim immunity the witness need not be *compelled* by subpœna to testify; since in theory of the law when an officer who has a legal right to make a demand, makes such demand upon a citizen, who has no legal right to refuse, and that citizen answers under such conditions, he answers under compulsion of the law. *U. S.* v. *Armour & Co.*, 142 Fed. 808, 822–823. (D. C.—N. D. Illinois, 1906.)

§ 577. Purpose of Immunity Acts.

The immunity acts are intended as a substitute for the privilege contained in the fifth constitutional amendment, reading: "Nor shall any person be compelled in any criminal case to be a witness against himself." This has been construed by the courts to mean that the witness shall have the right to remain silent when questioned upon any

subject where the answers would tend to incriminate him. The privilege cannot be taken away without giving an immunity at least as broad and extensive. *U. S.* v. *Armour & Co.*, 142 Fed. 808, 821, 822. (D. C.—N. D. Illinois, 1906.)

§ 578. Absolute Immunity must be Given.

A statutory enactment to remove the criminality of an offense so as to immunize a witness must afford absolute immunity to such witness against future prosecution for the offense to which the question relates. *Hale* v. *Henkel*, 201 U. S. 43, 67 (1906); *Counselman* v. *Hitchcock*, 142 U. S. 547, 586 (1892).

§ 579. Scope of Section 860 of the Revised Statutes.

"Since the statute of February 11, 1893 (27 Stat. 443), parties or witnesses in cases or proceedings under the act of February 4, 1887 (24 Stat. 379), to regulate commerce, and amendments thereto, may be required to answer questions that tend to criminate the witness or party; but witnesses or parties in other cases may not be required to answer criminating questions, because section 860 of the Revised Statutes does not afford complete indemnity to the witness or party." (SHELBY, *District Judge.*) *Foot* v. *Buchanan*, 113 Fed. 156, 160. (C. C.—N. D. Mississippi, W. D. 1902.)

"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition.

In view of the constitutional provision, a statutory enactment to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." (*Mr. Justice* BLATCHFORD.) *Counselman* v. *Hitchcock*, 142 U. S. 547, 585–586 (1892); *Foot* v. *Buchanan*, 113 Fed. 156, 159. (C. C.—N. D. Mississippi, W. D. 1902.)

§ 580. Meaning of "Proceeding."

As used in the immunity statute the word "proceeding" is a broad term and includes any step preliminary or otherwise which is incident to the institution of a civil suit or a criminal prosecution. Accordingly an investigation by a grand jury in the exercise of its inquisitorial power is embraced by this statute. *In re Hale*, 139 Fed. 496, 501–502. (C. C.—S. D. New York, 1905.)

§ 581. Operation of Fifth Amendment.

"The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply." That is "if the offense be outlawed or pardoned, or its criminality removed by statute, the Amendment ceases to apply." (*Mr. Justice* BROWN.) *Hale* v. *Henkel*, 201 U. S. 43, 67 (1906).

§ 582. When Fifth Amendment does not Apply.

"If the testimony relates to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the (fifth) amendment does not apply." (*Mr. Justice* BROWN.) *Hale* v. *Henkel*, 201 U. S. 43, 67 (1906).

§ 583. Immunity is Personal. Third Persons not Protected.

"The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. . . . The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation." (*Mr. Justice* BROWN.) *Hale* v. *Henkel*, 201 U. S. 43, 69–70 (1906).

"The immunity provided by the Fifth Amendment against self-incrimination is personal to the witness himself, and he cannot set up the privilege of another person or of a corporation as an excuse for a refusal to answer—in other words, the privilege is that of the witness himself, and not that of the party on trial." (*Mr. Justice* BROWN.) *M'Alister* v. *Henkel*, 201 U. S. 90, 91 (1906).

§ 584. Breadth of Present Immunity Statutes.

The immunity obtained by the witness under the law is broader than the privilege given by the Fifth Amendment, in that he is personally immunized as to the offense charged in the indictment; and this is true whether the particular evidence given by the witness be incriminating or not. *U. S.* v. *Armour & Co.*, 142 Fed. 808, 822. (D. C.—N. D. Illinois, 1906.)

§ 585. No Immunity for Corporation, but Possibly for Officer or Agent.

Under the immunity statute there can be no immunity for a corporation as to disclosing incriminating facts. An officer or agent of such corporation, however, may if the

facts bring him personally within the purview of the law, plead such immunity. *U. S.* v. *Armour & Co.*, 142 Fed. 808, 818. (D. C.—N. D. Illinois, 1906.)

A corporation is a creature of the state, and is subject to the special laws determining its privileges and to the limitations of its charter. There is a reserved right in the legislature to investigate its contracts and find out if it has exceeded its powers. "While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation invested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges." (*Mr. Justice* BROWN.) *Hale* v. *Henkel*, 201 U. S. 43, 74–75 (1906).

§ 586. No Necessity to Claim Immunity.

It is not necessary for a witness to claim immunity under the law. The immunity flows to the witness by action of law and without any claim on his part. *U. S.* v. *Armour & Co.*, 142 Fed. 808, 822 (D. C.—N. D. Illinois, 1916), and cases cited.

§ 587. Defendants Called as Witnesses by Co-defendants.

"It was not the intention of Congress in passing the immunity act for the enforcement of the provisions of the Sherman Law, either in civil or criminal proceedings, to extend immunity to defendants called as witnesses by co-defendants to testify in the latter's behalf." HOLLAND, *District Judge.*) *U. S.* v. *Standard Sanitary Mfg. Co.*, 187 Fed. 232, 237. (C. C.—E. D. Penn. 1911.)

§ 588. Sworn Answers of Defendants to Government Bill in Equity.

Defendants to a bill in equity brought by the govern-

ment under Section 4 of the Act who file sworn answers thereto, the bill not waiving answers under oath, are not thereby rendered immune under the Immunity Statute, such answers not being testimony or production of evidence under oath in obedience to a subpœna within the meaning of said statute. *U. S.* v. *Standard Sanitary Mfg. Co.*, 187 Fed. 229, 230. (D. C.—E. D. Michigan, S. D. 1911.)

§ 589. Effect of Immunity Under State Statute.

The fact that an immunity granted to a witness under a state statute, would not prevent a prosecution of such a witness for the violation of a federal statute, does not invalidate such state statute, under the Fourteenth Amendment. *Hale* v. *Henkel*, 201 U. S. 43, 68–69 (1906).

§ 590. Effect of Federal Immunity upon State Courts.

That a federal immunity statute offers no immunity from prosecution in the state courts, is no answer if the witness is protected against future prosecution at the instance of the federal government. *Hale* v. *Henkel*, 201 U. S. 43, 68 (1906).

§ 591. Contempt: Prohibition must be Clearly Defined.

"The order alleged to be violated must not only come clearly within the competency of the court to make, but the thing or act enjoined must be clearly and definitely defined, so as to leave the party enjoined in no reasonable doubt or uncertainty as to what specific thing or act is prohibited." (PHILIPS, *District Judge.*) *U. S.* v. *Atchison, T. & S. F. Ry. Co.*, 142 Fed. 176, 182–183. (C. C.—W. D. Missouri, W. D. 1905.)

§ 592. Information in Contempt Proceedings.

An information against one Agler for contempt of court

in disobeying an injunction "lacks considerable of having the certainty and precision that is essential," where "it is not alleged that this man was one of the unknown parties that are referred to in the injunction, . . . that the restraining order was a lawful one, in the language of the statute," and "that either by his words or acts, he was engaged in aiding the common object with other members of the American Railway Union." (BAKER, *District Judge.*) *U. S.* v. *Agler*, 62 Fed. 824, 828. (C. C. Indiana, 1894.)

§ 593. Lack of Jurisdiction.

"It is always permissible to show, upon process for contempt, that the order obeyed was beyond the jurisdiction of the authority from which it emanated. If that showing is successfully made, no punishable contempt has been committed." (PHILIPS, *District Judge.*) *U. S.* v. *Atchison, T. & S. F. Ry. Co.*, 142 Fed. 176, 182 (C. C.—W. D. Missouri, W. D. 1905), quoting from *St. Louis, etc., Railroad Co.* v. *Wear*, 135 Mo. 230, 265.

§ 594. Cannot Disobey Injunction Because Bill is Demurrable.

"There is not an authority, in the judgment of the court, that can be found in the books—certainly the court is aware of none—in which it has ever been held that a man who was enjoined and had violated the injunction could escape punishment by alleging that, at the time the writ of injunction was issued, the bill was demurrable." (BAKER, *District Judge.*) *U. S.* v. *Agler*, 62 Fed. 824, 826. (C. C. Indiana, 1894.)

§ 595. Criminal Contempt. Reasonable Doubt.

An alleged failure of a defendant to comply with an in-

junction granted upon a bill in equity brought by the United States under the Act belongs to what are termed "criminal contempts." "As such the proceeding is to be strictly construed in favor of the personal liberty of the defendant. As it is to vindicate the dignity of the court in compelling respect for its mandate, a judge may best demonstrate his title to respect by according to the accused the benefit of any reasonable doubt in his own mind as to the obligatory force of his command, and whether or not its disobedience was willful." (PHILLIPS, *District Judge.*) *U. S.* v. *Atchison, T. & S. F. Ry. Co.*, 142 Fed. 176, 181–182. (C. C.—W. D. Missouri, W. D. 1905.)

§ 596. Inquisitorial Power of Grand Jury.

"A grand jury has certain inquisitorial powers—and by this is meant the power of instituting an investigation to discover whether a particular crime has been committed—is also a proposition which has been frequently affirmed by the courts of this country; but as to the extent and limitation of this power there is pronounced divergence of opinion." (WALLACE, *Circuit Judge.*) *In re Hale*, 139 Fed. 496, 498. (C. C.—S. D. New York, 1905.)

§ 597. Interference with Receiver.

"Any willful attempt by any one with knowledge that the road (railroad) is in the hands of the court, to prevent or impede the receiver from complying with the order of the court in running the road, when the attempt is unlawful, and as between private individuals, would give a right of action for damages, is a contempt of the order of the court." (TAFT, *Circuit Judge.*) *Thomas* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 816. (C. C.—S. D. Ohio, W. D. 1894.)

§ 598. Enticing away Employees of Receiver.

Accordingly it has been held that maliciously to prevent the operation of such road by calling out the receiver's employees is punishable as a contempt. *Thomas* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 816. (C. C.—S. D. Ohio, W. D. 1894.)

Quære, however, as to application of Clayton Act, Sect. 20, in modification of this doctrine, where only peaceful means are used.

§ 599. Writ of Error or Appeal on Judgment for Contempt.

A writ of error may be prosecuted by a witness who is not a party to the original suit to review a judgment of contempt against him for disobeying the order of the court to answer certain questions and produce certain books and papers; such judgment constituting practically an independent proceeding and amounting to a final judgment. A mere direction of the court to answer questions or to produce written evidence, however, is not a final decision but is interlocutory and collateral in the principal suit and is not reviewable by appeal or writ of error. *Alexander* v. *U. S.*, 201 U. S. 117, 121–122 (1906) and cases cited.

§ 600. Punishment for Contempt Under Clayton Act.

Willful disobeying of orders or process of the court meets with summary punishment under the Clayton Act, the procedure relating to which is therein fully set forth, and the most striking features of which are the provisions made for jury trial, and for the limitation of action to within one year from the act complained of. *Clayton Act* (Act of October 15, 1914), Sects. 21–25.

See also Chapter on the Clayton Act herein for digest of provisions.

CHAPTER XIX

THE CLAYTON ACT

§ 601. Clayton Act in General.

Essentially the act of October 15, 1914, popularly known as the "Clayton Act" is complementary to the Sherman Anti-trust Act, and makes no material changes therein except as supplementing the same and enlarging the individual right of action. By the provisions of this new act, any person may enforce his rights thereunder either at law or in equity, and may avail himself, as prima facie evidence of liability, of any pertinent decision under the Anti-trust Acts subsequently rendered in the federal courts against the same defendant where the government was plaintiff. Certain phases of price discrimination, exclusive use conditions of patented and unpatented articles, and interlocking directorates are expressly forbidden. The application of the anti-trust laws to labor, agricultural, or horticultural organizations is left, however, somewhat indefinite and obscure. The most radical feature of the new act is the placing the enforcement of certain of its provisions into the hands of commissions, who are given extensive powers of investigation although in the last analysis their orders to be actually binding must be approved by the circuit court of appeals having jurisdiction.

§ 602. Commerce Defined.

"Commerce," as used in the Clayton Act, means trade

or commerce among the several states, and with foreign nations, or between the District of Columbia or any territory of the United States and any state, territory or foreign nations, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any state or territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any territory or any insular possession or other place under the jurisdiction of the United States; the Philippine Islands, however, being expressly excepted from the application of the Act. *Act of October 15, 1914* (Clayton Act), Sect. 1.

§ 603. " Person " or " Persons " Defined.

The word "person" or "persons" wherever used in the Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, or the laws of any territory, state or foreign country. *Act of October 15, 1914* (Clayton Act), Sect. 1.

§ 604. Price Discrimination.

It is unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within any place under the jurisdiction of the United States, if the effect thereby be to substantially lessen competition or to tend to create a monopoly,— except on account of differences of grade, quantity, quality, cost of selling or transportation, or to meet competition or where the bona fide selection of customers, not in restraint of trade, is concerned. *Act of October 15, 1914* (Clayton Act), Sect. 2.

§ 605. Exclusive Use Restrictions or Conditions on Patented or Unpatented Articles.

It is unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for the sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within any place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor of the lessor or seller where the effect may be to substantially lessen competition or tend to create a monopoly. *Act of October 15, 1914* (Clayton Act), Sect. 3.

§ 606. Extension of Action at Law to Include Further Offenses Forbidden by Act.

Section four of the Act is substantially the same as section seven of the Sherman Anti-Trust Act, except that the characterization of the plaintiff as "any other person or corporation" is omitted, that the defendant may also be sued where he has an agent, and that the words "the anti-trust laws" are substituted for corresponding language in the latter, and made to include not only the things declared to be unlawful by the Sherman Anti-Trust Act and amendments but also the additional things declared to be unlawful by the Clayton Act. The text of the clause is as follows,—"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the

amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *Act of October 15, 1914* (Clayton Act), Sect. 4.

§ 607. Effect upon Action at Law of Final Judgment or Decree in Government Suits.

A final judgment or decree rendered subsequent to the Act in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated such laws shall be prima facie evidence against such defendant in any court or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto, provided such judgments or decrees were not entered by consent before any testimony has been taken after the date of the Act. *Act of October 15, 1914* (Clayton Act), Sect. 5.

§ 608. Suspension of Running of Statute of Limitations in Private Actions.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof. *Act of October 15, 1914* (Clayton Act), Sect. 5.

§ 609. Labor, Agricultural or Horticultural Organizations.

The labor of a human being is not a commodity or article of commerce. The existence and operation of labor,

agricultural or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit is not forbidden by the Act. Neither are the individual members of such organizations forbidden or restrained from carrying out the legitimate objects thereof, nor shall such organizations, nor the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws. *Act of October 15, 1914* (Clayton Act), Sect. 6. .

As to the effect of this section upon the law as it existed prior to the date of the act, see Chapter V, Labor Organizations, herein.

§ 610. Ownership by One Corporation of the Capital Stock of Another.

All corporations engaged in interstate commerce are forbidden from acquiring directly or indirectly the stock of one another where the effect of such acquisition or voting of the stock is to substantially lessen competition between such corporations or to restrain such commerce or tend to create a monopoly. From such prohibition, however, are to be excluded purchases of stock solely for purposes of investment or the legitimate formation of subsidiary corporations where the effect is not to substantially lessen competition, and also the acquisition of stock by a common carrier of substantially non-competing branch or extension lines located so as to become feeders to the main line of the company, or as a part of its system. *Act of October 15, 1914* (Clayton Act), Sect. 7.

§ 611. Interlocking Directorates and Double Employment.

1. *Banks, Banking Associations and Trust Companies.* Generally speaking the Act, after the expiration of two

years from the date of its enactment, forbids interlocking directorates or double service or double employment in any banking concern or trust company of any person who is also a director or other officer or employee of a federal banking concern or trust company independent thereof and having deposits, capital, surplus and undivided profits aggregating more than $5,000,000. Such interlocking directorates and double employment are also forbidden regardless of said amount where said concerns are located in the same place, and where such place has a population of more than two hundred thousand as shown by the last census, excepting, however, (1) mutual savings banks not having a capital stock represented by shares, (2) not more than one other banking or trust concern where the entire capital stock of one is owned by the stockholders in the other, and (3) each of the directors of class A of a Federal Reserve Bank who may also be both an officer and director in one member bank.

2. *Corporations other than Banking Concerns, Trust Companies and Common Carriers.* After two years from date of the Act, interlocking directorates are forbidden in competing corporations engaged in interstate or foreign commerce any one of which has capital, surplus and undivided profits aggregating more than $1,000,000, other than banks, banking associations, trust companies and common carriers subject to the Interstate Commerce Act, where the agreed elimination of competition between them would violate the anti-trust laws.

The eligibility of any director, officer or employee under either of the clauses of this section is to be determined in accordance with the provisions of the Act by the financial condition of the corporation at the end of the fiscal year next preceding his election, and it shall be lawful for him when duly elected or selected to continue in his office or

employment for one year thereafter. *Act of October 15, 1914* (Clayton Act), Sect. 8.

§ 612. Changes in Affairs Affecting Eligibility.

When any person is eligible and is elected, chosen or selected as a director, officer or employee of any bank or other corporation subject to the Act, such eligibility is not affected by reason of any change in its affairs from whatsoever cause until the expiration of one year thereafter. *Act of October 15, 1914* (Clayton Act), Sect. 8.

§ 613. Embezzlement by Officers or Employees of Common Carriers.

"Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from or used in such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than $500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court." *Act of October 15, 1914* (Clayton Act), Sect. 9.

§ 614. Competitive Bidding in Dealings with Common Carriers.

After two years from the date of the Act, any common carrier is prohibited from having dealings in articles of commerce or contracts for construction or maintenance exceeding $50,000 in the aggregate in any one year where an officer or selling or purchasing agent of such common

carrier is also employed by or has a substantial interest in the party with whom said carrier is dealing or contracting, unless such dealings are with the bidder whose bid is the most favorable to said carriers under regulations prescribed by the Interstate Commerce Commission. In case of bidders, names and addresses are required to be given with the bid as set forth in the Act. Provisions are also made for the filing of full and detailed statements within thirty days after the transaction or purchase. And for violations of the above provisions, a common carrier shall be fined not exceeding $25,000, and any director, agent, manager or officer thereof who knowingly participated or aided or abetted in said violations shall be deemed guilty of a misdemeanor and fined not exceeding $5,000, or confined in jail not exceeding one year or both. *Act of October 15,1914* (Clayton Act), Sect. 10.

§ 615. Enforcement of Compliance with Sections Two, Three, Seven and Eight.

That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce. *Act of October 15, 1914* (Clayton Act), Sect. 11.

§ 616. Complaint Under the Act.

When the commission or board vested with jurisdiction thereof has reason to believe any person has violated or is violating sections two, three, seven and eight, it may issue and serve upon such person a complaint thereof con-

taining a notice of a hearing upon a place and a date therein fixed at least thirty days after service, at which time and place such person may appear and show cause why he should not be ordered to desist from violating the law as charged. For good cause shown, any person may intervene in person or by counsel. Upon said hearing the testimony is to be reduced to writing and filed and if the commission decides against the defendant it makes a report of its findings, and orders such defendant to cease and desist from the violations complained of, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of the Act. Until, however, the filing of a transcript of the record with the U. S. Circuit Court of Appeals as provided by the Act, the said report or order may be modified or set aside by the commission in whole or in part. *Act of October 15, 1914* (Clayton Act), Sect. 11.

§ 617. Proceedings to Enforce Order of Commission.

In case any person fails or neglects to obey the order of the commission or board, it may apply to the U. S. Circuit Court of Appeals having jurisdiction for the enforcement of such order, at the same time filing therewith a transcript of the entire record, of which application the defendant shall have notice, and thereupon such court shall affirm, modify or set aside the order of said commission; the findings of said commission, however, being conclusive as to the facts if supported by testimony. *Act of October 15, 1914* (Clayton Act), Sect. 11.

§ 618. Application to Adduce Additional Evidence.

Where there are reasonable grounds for not presenting additional evidence of a material character before the commission or board at the time of the hearing, either

party may apply to the court for leave to adduce such evidence, and thereupon the court upon such terms and conditions as it deems proper may order such evidence to be taken before the said commission or board, which may accordingly modify or add to its previous findings and may recommend the modification or setting aside of its original order. *Act of October 15, 1914* (Clayton Act), Sect. 11.

§ 619. Review by Supreme Court upon Certiorari.

The judgment and decree of the U. S. Circuit Court of Appeals shall be final, except that the same shall be subject to review upon certiorari as provided in section two hundred and forty of the Judicial Code. *Act of October 15, 1914* (Clayton Act), Sect. 11.

§ 620. Review of Order of Commission by Circuit Court of Appeals.

Upon the filing of a written petition praying that the order of the commission or board be set aside, the party subject thereto may obtain a review of such order by the U. S. Circuit Court of Appeals. After service of such petition, the commission or board files its transcript of the entire record, and thereupon, the court may affirm, set aside or modify the said order in the same manner as in an application by said commission or board to enforce its order. *Act of October 15, 1914* (Clayton Act), Sect. 11.

§ 621. Exclusive Jurisdiction of Circuit Court of Appeals of the United States.

The jurisdiction of the Circuit Court of Appeals of the United States, to enforce, set aside, or modify orders of the commission or board shall be exclusive. *Act of October 15, 1914* (Clayton Act), Sect. 11.

§ 622. Precedence of Proceedings Relative to Orders of Commission or Board.

Such proceedings in the Circuit Court of Appeals shall be given precedence over all other cases pending therein, and shall be in every way expedited. *Act of October 15, 1914* (Clayton Act), Sect. 11.

§ 623. Order Cannot Relieve Liability Under the Anti-Trust Acts.

No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the anti-trust acts. *Act of October 15, 1914* (Clayton Act), Sect. 11.

§ 624. Service of Complaints, Orders and Other Processes.

Complaints, orders, and other processes of the commission or board may be served by anyone by it duly authorized, either (a) by delivering a copy thereof to the person, member of the partnership, or executive officer or director of the corporation, to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. A verified return of service should be made as required by the Act. *Act of October 15, 1914* (Clayton Act), Sect. 11.

§ 625. Venue of Actions Against Corporations.

That any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. *Act of October 15, 1914* (Clayton Act), Sect. 12.

§ 626. Where Subpœna for Witnesses may Run.

In all suits, civil or criminal, brought by the United States in any district under the anti-trust acts, subpœna requiring the attendance of witnesses may run into any district, except that in civil cases the permission of the trial court must be obtained by cause shown for subpœna running out of the district for a greater distance than one hundred miles. *Act of October 15, 1914* (Clayton Act), Sect. 13.

§ 627. When Violation by Corporation is also Violation by its Officers.

Whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court. *Act of October 15, 1914* (Clayton Act), Sect. 14.

§ 628. Proceedings in Equity by the United States.

The several district courts of the United States have jurisdiction to prevent and restrain violations of the Act, and proceedings in equity may be instituted and parties brought before the court, in the same manner and form as under sections four and five of the Sherman Anti-Trust Act. *Act of October 15, 1914* (Clayton Act), Sect. 15.

§ 629. Proceedings in Equity by a Private Person.

A radical departure is made from the Sherman Anti-

Trust Act by Section 16 of the Clayton Act which extends the right of injunctive relief against threatened loss or damage by a violation of the anti-trust laws to any person, firm, corporation or association likely to suffer thereby. If it be shown that the danger of irreparable damage is immediate, a preliminary injunction may issue upon the execution of a proper bond by the plaintiff. No one, however, except the United States is to be entitled to bring suit for injunctive relief against any common carrier subject to the Interstate Commerce Act. *Act of October 15, 1914* (Clayton Act), Sect. 16.

§ 630. Issuance of Preliminary Injunctions and Restraining Orders.

While the Act affirms that no preliminary injunction shall be issued without notice to the opposite party, it is nevertheless provided that a temporary restraining order may be granted where it clearly appears from specific facts shown by affidavit or the verified bill that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. The term of such order is not to exceed ten days, unless extended for good cause shown, and the party obtaining such order shall promptly proceed with the matter of the issuance of a preliminary injunction which shall take precedence of everything except older matters of the same character. The opposing party on the other hand may call up the dissolution or modification of the order on two days' notice. *Act of October 15, 1914* (Clayton Act), Sect. 17.

§ 631. Giving of Security by Applicant for Restraining Order.

Except as otherwise provided in Section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by

the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby. *Act of October 15, 1914* (Clayton Act), Sect. 18.

§ 632. Formal Requisites and Scope of Injunction and Restraining Order.

Every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same. *Act of October 15, 1914* (Clayton Act), Sect. 19.

§ 633. Injunctions and Restraining Orders Between Employers and Employees.

No injunction or restraining order is to be granted in any case between an employer or employers and employees, or between employees, or between persons employed or persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury where there is no adequate remedy at law. *Act of October 15, 1914* (Clayton Act), Sect. 20.

§ 634. Peaceful Persuasion, Termination of Employment, Cessation of Patronage, etc., not to be Enjoined.

No such restraining order or injunction shall prohibit

any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. *Act of October 15, 1914* (Clayton Act), Sect. 20.

§ 635. Contempt Proceedings.

1. *Where Act or Thing Done was also Criminal Offense.* Any person who shall willfully disobey any lawful writ, process, order, rule, decree or command of any district court or any court of the District of Columbia may be punished for contempt where the act or thing done by him was also a criminal offense under federal or state laws. On demand of the accused a jury trial may be had, and if found guilty may be fined if a natural person not exceeding one thousand dollars or imprisoned not exceeding six months. As in other criminal cases, a bill of exceptions or writ of error will lie to the appellate court. *Act of October 15, 1914* (Clayton Act), Sects. 22 and 23.

2. *Other Forms of Contempt.* Contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, or contempts committed in disobedience of any lawful writ, process, rule, decree or command entered in any suit or action instituted by federal authority, and all other cases of contempt not specifically embraced in section twenty-one of the Act, may be punished in conformity to the usages at law and in equity now prevailing. *Act of October 15, 1914* (Clayton Act), Sect. 24.

3. *Limitation of Proceeding.* With the exception of contempt proceedings pending at the date of the Act, no proceeding for contempt shall be instituted against any person unless begun within one year of the act complained of, nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts. *Act of October 15, 1914* (Clayton Act), Sect. 25.

§ 636. Effect of Invalid Matter.

If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. *Act of October 15, 1914* (Clayton Act), Sect. 26.

CHAPTER XX

THE FEDERAL TRADE COMMISSION AND UNFAIR TRADE

§ 637. New Régime in Remedial Legislation.

With the creation of the Federal Trade Commission is inaugurated a new régime in remedial legislation for the prevention of methods of unfair competition in interstate commerce through the monitorial power of an administrative body. With the exception of matters relating to banks and common carriers, this commission is given power of its own volition to bring before it any person, partnership or corporation and to compel such defendant or defendants to show cause why an order should not be entered requiring the cessation of the violations of law charged in the complaint. The commission also has very extensive powers of investigation, and of requiring the filing of reports from all persons or concerns subject to its jurisdiction.

§ 638. Personnel of the Commission.

The Federal Trade Commission is composed of five members appointed by the President by and with the advice and consent of the Senate, and not more than three of such members shall be of the same political party. The ordinary term of each member is seven years except in case of the first commissioners appointed who are to serve for varying terms. No commissioner shall engage in any other business, vocation, or employment, and any commissioner may be removed by the President for cause. *Act of September 26, 1914*, Sect. 1.

§ 639. Bureau of Corporations and Commissioners Abolished.

Upon the organization of the commission and the election of its chairman, the Bureau of Corporations, and the office of Commissioner and Deputy Commissioner of Corporations shall cease to exist, and all pending investigations and proceedings of such bureau shall be continued by the commission. *Act of September 26, 1914*, Sect. 3.

§ 640. Principal Office and Places of Meeting.

The principal office of the commission shall be in the City of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States. *Act of September 26, 1914*, Sect. 3.

§ 641. Persons or Concerns Subject to Act.

All persons, partnerships or corporations engaged in interstate commerce, except banks and common carriers subject to the Acts to regulate commerce, are liable to prosecution under this Act if the commission has reason to believe that such persons, partnerships or corporations have been or are using any unfair method of competition in interstate or foreign commerce. *Act of September 26, 1914*, Sect. 5.

§ 642. Unfair Methods of Competition.

Unfair methods of competition in interstate or foreign commerce are declared by the Act to be unlawful: *Act of September 26, 1914*, Sect. 5.

§ 643. Unfair Competition Defined.

"The essence of the wrong in unfair competition con-

sists in the sale of the goods of one manufacture or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails." (*Mr. Chief Justice* FULLER.) *Howe Scale Co.* v. *Wyckoff, Seamans, etc.*, 198 U. S. 118, 140 (1905).

§ 644. General Grounds for Prevention of Unfair Competition.

Two general grounds calling for equitable relief have been recognized by the courts, "First, to secure to him who has been instrumental in bringing into the market a superior article of merchandise the fruit of his industry and skill, and, secondly, to protect the community from imposition." (NEIL, *Special Justice.*) *C. F. Simmons Medicine Co.* v. *Mansfield Drug Co.*, 93 Tenn. 84 (1893).

"Equity gives relief in such a case, upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer." (*Mr. Justice* CLIFFORD.) *McLean* v. *Fleming*, 96 U. S. 245, 251 (1877).

§ 645. Scope of "Unfair Methods of Competition."

Notwithstanding that the words "Unfair Competition" have usually been given a somewhat restricted meaning by the courts, not being interpreted to extend beyond what is necessary to protect a manufacturer in his use of trade-names and signs, methods of dressing his goods, and advertising the same both where there is or is not

involved the question of any exclusive right, it would appear, nevertheless, that the words "Unfair Methods of Competition" as used in the Act have a much broader scope, and should include any unfair means employed by a manufacturer or merchant to injure and interfere with the business of a competitor whether by the passing off of the goods of the former as the goods of the latter, or by interfering with his contracts, or by harassing or interrupting the progress of his trade in the channels of interstate commerce. The use of the words "Unfair Methods of Competition" instead of the usual words "Unfair Competition" plainly indicates that a broad interpretation is required, and that any unfair method whereby one competitor arbitrarily restrains or obstructs the interstate or foreign trade of another is included within the scope of the Act, particularly in view of the fact that the commission is required to co-operate with the federal courts in the enforcement of the Anti-trust Acts.

§ 646. Complaint Under the Act.

The proceeding under the act is instituted by the commission when they have reason to believe that a case of an unfair method of competition is presented, and that the public interest requires an investigation. A complaint is thereupon prepared and served upon the defendant at least thirty days before the date set for hearing therein, who is required to appear before the commission at the time and place designated to show cause why an order should not be entered against him for violating the law. Any person for cause shown may intervene upon proper application. *Act of September 26, 1914*, Sect. 5.

§ 647. Testimony and Report.

The testimony in the proceeding is reduced to writing

and duly filed, and in case that the commission finds that the method of competition is prohibited by the Act, they prepare a written report of their findings and issue an order requiring the defendant to desist from using such method. The commission may modify or set aside such report in whole or in part at any time before they file the same in the United States Circuit Court of Appeals having jurisdiction. *Act of September 26, 1914*, Sect. 5.

§ 648. Enforcement of Order.

In case of the failure of any defendant to comply with the order of the Commission, they may thereupon apply to the U. S. Circuit Court of Appeals where such defendant resides, carries on business, or has used the alleged method of unfair competition, for the enforcement of such order, filing with such application a transcript of the entire record. Notice is thereupon given of such application to the defendant, and the said court proceeds in due course to enter a decree affirming, modifying or setting aside the order of the commission; the findings of the commission as to the facts if supported by the testimony being conclusive. *Act of September 26, 1914*, Sect. 5.

§ 649. Additional Evidence.

Upon a proper showing of reasonable grounds for failure to present additional evidence at the hearing, the court on application of either party may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court shall seem proper, and the commission may modify its findings or make new findings accordingly. *Act of September 26, 1914*, Sect. 5.

§ 650. Review by Supreme Court.

The judgment and decree of the U. S. Circuit Court of

Appeals shall be final except that the same shall be subject to review by the Supreme Court upon certiorari as provided in the Judicial Code. *Act of September 26, 1914*, Sect. 5.

§ 651. Review in U. S. Circuit Court of Appeals.

Any party ordered by the commission to desist from using methods declared by them to be methods of unfair competition, may have the said order reviewed by the U. S. Circuit Court of Appeals upon the filing of a proper written petition. *Act of September 26, 1914*, Sect. 5.

§ 652. Exclusive Jurisdiction of U. S. Circuit Court of Appeals.

The jurisdiction of the U. S. Circuit Court of Appeals to enforce, set aside, and modify orders of the commission shall be exclusive. *Act of September 26, 1914*, Sect. 5.

§ 653. Expediting of Proceedings Under the Act.

Such proceedings in the U. S. Circuit Court of Appeals shall be given precedence over all other cases pending therein, and shall be in every way expedited. *Act of September 26, 1914*, Sect. 5.

§ 654. No Relief from Liability Under the Anti-Trust Acts.

No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership or corporation from any liability under the anti-trust acts. *Act of September 26, 1914*, Sect. 5.

§ 655. Additional Powers of Commission.

The commission also has the power to gather and compile and to investigate the affairs of any corporation engaged in interstate or foreign commerce, excepting banks

and common carriers subject to the Act to Regulate Commerce; to require such corporation by general or special orders to file sworn reports or answers relative to its organization, business, practices, etc., required by the commission; to investigate upon its own initiative and report the manner in which decrees under the anti-trust acts are being carried out by any defendant corporations; to investigate and report at the request of the President or either House of Congress the facts relating to any alleged violations of the anti-trust acts by any corporation; to investigate at the application of the Attorney-General and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust acts; to publish such portions of the information obtained by it, except trade secrets and names of customers, as it shall deem expedient in the public interest; to make annual and special reports to Congress with recommendations for additional legislation; to provide for the publication of its reports; to classify corporations and to make rules and regulations for carrying out the provisions of this Act; and to investigate and report upon trade conditions in and with foreign countries where the foreign trade of the United States may be affected. *Act of September 26, 1914*, Sect. 6.

§ 656. Further Powers of Commission given by Clayton Act. Except as regards common carriers subject to the Interstate Commerce Act, banking concerns and trust companies, the commission is given authority to enforce compliance with sections two, three, seven and eight of the Clayton Act. *Act of October 15, 1914* (Clayton Act), Sect. 11.

Section two with certain exceptions is levelled against discriminations in price between different purchasers of

commodities where the effect of such discrimination is to substantially lessen competition or to tend to create a monopoly; *section three* is directed against exclusive use agreements or conditions in connection with both patented and unpatented articles where the effect is to substantially lessen competition or to tend to create a monopoly; *section seven* prohibits the acquisition by a corporation of the stock of a competing corporation otherwise than solely for investment purposes or the formation of mere subsidiary corporations, where the effect of such acquisition is substantially to lessen competition between them or to restrain commerce or to tend to create a monopoly; and *section eight* so far as concerns the Federal Trade Commission denounces and forbids interlocking directorates after two years from the passage of the act in corporations subject to the supervision of the commission, where such corporations have a capital, surplus and undivided profits aggregating more than $1,000,000, and where such corporations are competitors so that the elimination of competition by agreement between them would constitute a violation of the anti-trust laws. *Act of October 15, 1914* (Clayton Act), Sects. 2, 3, 7 and 8.

§ 657. Form of Decree in Anti-Trust Cases.

In a suit in equity brought under the anti-trust laws at the instance of the Attorney General, the federal court, at the conclusion of the testimony if then of the opinion the complainant is entitled to relief, may refer such suit to the commission as a master in chancery to ascertain and report an appropriate form of decree. *Act of September 26, 1914*, Sect. 7.

§ 658. Right to Copy Documentary Evidence of Corporation.

For the purposes of this Act, the commission or its duly

authorized agent or agents, shall at all reasonable times have access to for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against. *Act of September 26, 1914*, Sect. 8.

§ 659. Witnesses.

The commission has the power to require the attendance of witnesses and the production of documentary evidence, by subpœna from anywhere in the United States, and in case of disobedience to a subpœna the aid of any federal court may be invoked. Any of the federal district courts within whose jurisdiction the inquiry is carried on, in case of refusal to obey a subpœna issued by the commission, may issue an order requiring the witness to appear before the commission or to produce documentary evidence if so ordered, or to give evidence touching the matter in question, and any failure to obey such order may be punished by said court as a contempt thereof. *Act of September 26, 1914*, Sect. 9.

§ 660. Mandamus.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of the Act or any order of the commission made in pursuance thereof. *Act of September 26, 1914*, Sect. 9.

§ 661. Depositions.

The commission may order testimony to be taken by deposition at any stage of the proceedings. *Act of September 26, 1914*, Sect. 9.

§ 662. Immunity.

No person may refuse to testify or to produce documentary evidence on the ground of incrimination or forfeiture, but no natural person shall be prosecuted or subjected to any penalty or forfeiture thereby except for perjury. *Act of September 26, 1914*, Sect. 9.

§ 663. Refusal to Testify.

Failure to testify or to produce documentary evidence in compliance with subpœna if within the power of the witness so to do is punished by a fine of not less than $1,000 or more than $5,000, or imprisonment for not more than one year, or by both such fine and imprisonment. *Act of September 26, 1914*, Sect. 10.

§ 664. False Returns or Reports.

False entries or statements of fact in reports required under the Act, or failure by a corporation to keep full, true and correct entries, or willful removal out of the United States, or mutilation, alteration or falsification of accounts, records or memoranda of such corporation, or refusal by such corporation to submit its documentary evidence, is punished by a fine of not less than $1,000 or more than $5,000, or by imprisonment of not more than three years, or both such fine and imprisonment. *Act of September 26, 1914*, Sect. 10.

§ 665. Failure of Corporation to File Annual and Special Reports.

Failure of a corporation to file any required annual or special report before the expiration of thirty days after notice of its default is subject to a forfeiture to the United States of the sum of $100 for each and every day of the continuance of such failure. *Act of September 26, 1914*, Sect. 10.

§ 666. Unlawful Publication by Officer of Commission.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court. *Act of September 26, 1914*, Sect. 10.

§ 667. Not to Prevent or Interfere with the Enforcement of Other Acts.

Nothing contained in this act shall be construed to prevent or interfere with the enforcement of the provisions of the anti-trust acts or the acts to regulate commerce, nor shall anything contained in the act be construed to alter, modify, or repeal the said anti-trust acts or the acts to regulate commerce or any part or parts thereof. *Act of September 26, 1914*, Sect. 11.

APPENDIX

THE SHERMAN LAW

(Act of July 2, 1890, 26 Stat. 209)

AN ACT to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or com-

merce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas

to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, or the laws of any of the Territories, the laws of any States, or the laws of any foreign country.

ANTI-TRUST AMENDMENTS TO THE WILSON TARIFF ACT OF AUGUST 27, 1894, SECTIONS 73–77.

(28 Stat. 570)

SEC. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void, when the same is made

by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

SEC. 74. That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such

temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 75. That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section seventy-three of this act, and being in the course of transportation from one State to another or to or from a Territory or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 77. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[The foregoing sections were expressly preserved in the Dingley Act of 1897. Section 34 of that act (30 Stat. 213) concludes as follows:]

And further provided, That nothing in this act shall be construed to repeal or in any manner affect the sections

numbered seventy-three, seventy-four, seventy-five, seventy-six, and seventy-seven of an act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," which became a law on the twenty-eighth day of August, eighteen hundred and ninety-four. (Sects. 73 & 75 amended, see p. 345 et seq.)

THE EXPEDITION ACT

(32 Stat. 823)

AN ACT To expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity pending or hereafter brought in any circuit court of the United States under the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. There-

upon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in the opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

SEC. 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court, and must be taken within sixty days from the entry thereof: PROVIDED, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

Approved, February 11, 1903.

(36 Stat. 854)

AN ACT To amend an act entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February fourth, eighteen hundred

and eighty-seven, or any other acts having a like purpose that may be hereafter enacted," approved February eleventh, nineteen hundred and three.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the act entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted," approved February eleventh, nineteen hundred and three, be, and the same is hereby, amended so as to read as follows:

"That in any suit in equity pending or hereafter brought in any circuit court of the United States under the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said court, if there be three or more; and if there be not more than two circuit judges, then before

them and such district judge as they may select; or, in case the full court shall not at any time be made up by reason of the necessary absence or disqualification of one of more of the said circuit judges, the Justice of the Supreme Court assigned to that circuit or the other circuit judge or judges may designate a district judge or judges within the circuit who shall be competent to sit in said court at the hearing of said suit. In the event the judges sitting in such case shall be equally divided in opinion as to the decision or disposition of said cause, or in the event that a majority of said judges shall be unable to agree upon the judgment, order, or decree finally disposing of said case in said court which should be entered in said cause, then they shall immediately certify that fact to the Chief Justice of the United States, who shall at once designate and appoint some circuit judge to sit with said judges and to assist in determining said cause. Such order of the Chief Justice shall be immediately transmitted to the clerk of the circuit court in which said cause is pending, and shall be entered upon the minutes of said court. Thereupon said cause shall at once be set down for reargument and the parties thereto notified in writing by the clerk of said court of the action of the court and the date fixed for the reargument thereof. The provisions of this section shall apply to all causes and proceedings in all courts now pending, or which may hereafter be brought.

Approved, June 25, 1910.

THE JUDICIAL CODE

AN ACT To codify, revise, and amend the laws relating to the judiciary.

(Approved, March 3, 1911; in effect January 1, 1912.)

SEC. 289. The circuit courts of the United States, upon

the taking effect of this act, shall be and hereby are abolished. . . .

SEC. 290. All suits and proceedings pending in said circuit courts on the day of the taking effect of this act, whether originally brought therein or certified thereto from the district courts, shall thereupon and thereafter be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein. . . .

SEC. 291. Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts.

THE IMMUNITY ACTS

(32 Stat. 854, 903)

AN ACT Making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes.

. . . . . .

That for the enforcement of the provisions of the act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto, and of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and all acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six

of the act entitled "An act to reduce taxation, to provide revenue for the Government, and other purposes," approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said acts in the courts of the United States: *Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

. . . . . .

Approved, February 25, 1903.

(34 Stat. 798)

AN ACT Defining the right of immunity of witnesses under the act entitled "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, and an act entitled "An act to establish the Department of Commerce and Labor, approved February fourteenth, nineteen hundred and three, and an act entitled "An act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and an act entitled "An act making appro-

priations for the legislative, executive, and judicial expense of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three.

That under the immunity provisions in the Act entitled "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the act entitled "An act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the act entitled "An act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the act entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

Approved, June 30, 1906.

THE CLAYTON ACT

[PUBLIC—NO. 212—63D CONGRESS]
[H. R. 15657]

AN ACT To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

"antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided,* That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either

directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or

contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of

in said suit or proceeding shall be suspended during the pendency thereof.

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same

by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any

person from the penal provisions thereof or the civil remedies therein provided.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located

in the same place: *Provided,* That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further,* That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further,* That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

SEC. 9. Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than $500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the district court of the United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bid-

ding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so

fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the

commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of

such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the anti-trust Acts.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other

process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

SEC. 13. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the anti-trust laws may run into any other district: *Provided*, That in civil cases no writ of subpœna shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the

duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except

the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such

temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

SEC. 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge

or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey

any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the

sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the

same as provided herein in case the rule had issued in the first instance.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

SEC. 26. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court

of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Approved, October 15, 1914.

THE FEDERAL TRADE COMMISSION ACT

[PUBLIC—NO. 203—63D CONGRESS]
[H. R. 15613]

AN ACT To create a Federal Trade Commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commis-

sioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

SEC. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of $5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The Auditor for the State and Other Departments shall

receive and examine all accounts of expenditures of the commission.

SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

SEC. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between

any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this Act.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"Antitrust acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been

filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts,

or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commis-

sion under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and in-

dividuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the

publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

SEC. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpœnas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpœna of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpœna issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 10. That any person who shall neglect or refuse to

attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such

default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

Approved, September 26, 1914.

FURTHER AMENDMENT OF WILSON TARIFF ACT

[Public—No. 370. Feb. 12, 1913]
[H. R. 25002]

AN ACT To amend section seventy-three and section seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section seventy-three and section seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," be, and the same are hereby, amended to read as follows:

"SEC. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any com-

modity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months."

"SEC. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy, and being the subject thereof, mentioned in section seventy-three of this Act, imported into and being within the United States or being in the course of transportation from one State to another, or to or from a Territory or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law."

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